

## CH. 56

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§56-1  
Forfeiture

§56-1(a)  
Generally

**People v. Enoch**, 122 Ill.2d 176, 522 N.E.2d 1124 (1988) 1. To preserve an issue for appeal, the issue must be both raised by an objection during trial and placed in the post-trial motion. See also, **People v. Wade**, 131 Ill.2d 370, 546 N.E.2d 553 (1989); **People v. Johnson**, 114 Ill.2d 170, 499 N.E.2d 1355 (1986); **People v. Herrett**, 137 Ill.2d 195, 561 N.E.2d 1 (1990); **People v. Nevitt**, 135 Ill.2d 423, 553 N.E.2d 368 (1990); **People v. Valko**, 201 Ill.App.3d 462, 559 N.E.2d 104 (1st Dist. 1990); **People v. Richmond**, 201 Ill.App.3d 130, 559 N.E.2d 302 (4th Dist. 1990)

2. A post-trial motion is required to be in writing and "specify the grounds" for reversal. In the absence of plain error, the failure to specify in writing the grounds for a new trial constitutes a forfeiture. See also, **People v. Hairston**, 46 Ill.2d 348, 263 N.E.2d 840 (1970) (issue must be specifically urged in a written post-trial motion); **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) (issue pertaining to prosecutor's closing argument was not specifically raised in post-trial motion, but only referred to in general terms).

3. The requirement for a written post-trial motion is forfeited by the prosecution's failure to object to an oral motion. See also, **People v. Bartlett**, 175 Ill.App.3d 686, 530 N.E.2d 90 (2d Dist. 1988).

**People v. Whitehead**, 35 Ill.2d 501, 221 N.E.2d 256 (1966) The requirement that a motion for new trial be in writing and list the specific grounds relied upon is forfeited if defendant makes a non-specific oral motion and the State fails to object. Defendant then is not precluded on appeal from raising any error that might appear in the record, though not specified in the oral post-trial motion for new trial. See also, **People v. Caballero**, 102 Ill.2d 23, 464 N.E.2d 223 (1984) (defense counsel "has an obligation to this court to comply with the statute [requiring a written motion for new trial], and the [prosecutor] has an obligation to object to general oral statements made by defense counsel that may be viewed as an oral motion for a new trial"); **People v. Porter**, 111 Ill.2d 386, 489 N.E.2d 1329 (1986); **People v. Sanders**, 143 Ill.App.3d 402, 493 N.E.2d 1 (1st Dist. 1986).

**People v. Friesland**, 109 Ill.2d 369, 488 N.E.2d 261 (1985) The rule that the State's failure to object to an oral post-trial motion constitutes forfeiture applies only where no written motion is filed.

**People v. Pickett**, 54 Ill.2d 280, 296 N.E.2d 856 (1972) The general rule (that defendant's failure to raise an issue in the written motion for a new trial constitutes forfeiture) applies to both constitutional and non-constitutional issues.

**People v. Farmer**, 165 Ill.2d 194, 650 N.E.2d 1006 (1995) The forfeiture rule is one of "administrative convenience rather than jurisdiction, and the goals of obtaining a just result and maintaining a sound body of precedent may sometimes override considerations of waiver." State did not forfeit argument though it failed to raise it in response to defendant's motion to dismiss the charges. See also, **People v. Bailey**, 159 Ill.2d 498, 639 N.E.2d 1278 (1994).

**People v. Lucas**, 231 Ill.2d 169, 897 N.E.2d 778 (2008) 1. The forfeiture doctrine applies to the State as well as defendant. The Court rejected the State's argument that defendant forfeited an issue because the State failed to raise the issue in the appellate court.

2. "A failure to raise an issue in a post-trial motion following a jury trial constitutes a waiver of that issue." But see, **People v. Kelly**, 76 Ill.App.3d 80, 394 N.E.2d 739 (5th Dist. 1979) ("the law is well settled" that a defendant convicted in a bench trial need not file a post-trial motion if he raised the issue in the trial court); **People v. Ocasio**, 148 Ill.App.3d 418, 503 N.E.2d 1059 (1st Dist. 1986).

**People v. Reed**, 177 Ill.2d 389, 686 N.E.2d 584 (1997) The plain language of **PA 88-311**, which modified **730 ILCS 5/5-8-1(c)** by requiring a written post-sentencing motion in order to preserve sentencing issues for appeal, "shows a clear legislative intent to make a post-sentencing motion the functional equivalent of a

post-trial motion for purposes of preserving issues for appeal."

[People v. Gokey, 57 Ill.2d 433, 312 N.E.2d 637 \(1974\)](#) In both civil and criminal cases, a defendant waives the right to a directed verdict by introducing evidence after his motion has been denied. See also, [People v. Wilson, 143 Ill.App.3d 236, 572 N.E.2d 937 \(1991\)](#) (where defendant elects to present evidence following the denial of his motion for a directed finding at the close of the State's case, any error in the trial judge's ruling is waived unless the motion is renewed at the close of all evidence).

[People v. Keene, 169 Ill.2d 1, 660 N.E.2d 901 \(1995\)](#) In capital cases, the failure to file a post-trial motion can be excused for three categories of errors: (1) errors for which a trial objection was made and that could be asserted in a post-conviction petition, (2) challenges to the sufficiency of the evidence, and (3) "plain" errors that undermine the fairness of the trial.

[In re W.C., 167 Ill.2d 307, 657 N.E.2d 908 \(1995\)](#) In delinquency proceedings, the minor is not required to file a written post-trial motion to preserve alleged errors for appeal.

[People v. Lutz, 73 Ill.2d 204, 383 N.E.2d 171 \(1978\)](#) A motion in arrest of judgment, without any prior objection, properly challenges the charging document and preserves the issue for appeal. See also, [People v. Smith, 99 Ill.2d 467, 459 N.E.2d 1357 \(1984\)](#).

[People v. Terrell, 185 Ill.2d 467, 708 N.E.2d 309 \(1998\)](#) In a concurring opinion, Chief Justice Freeman discussed the majority's "nonchalant and . . . inconsistent" treatment of issues which it held to be forfeited. Justice Freeman stated that on direct review there are only three grounds on which a reviewing court may excuse procedural default: (1) the defense made a timely trial objection but omitted the issue from the post-trial motion, and the claim could later be asserted in a post-conviction petition; (2) the issue involves a challenge to the sufficiency of the evidence; or (3) "plain error" is involved.

[People v. Thigpen, 33 Ill.2d 595, 213 N.E.2d 534 \(1966\)](#) The court should have conducted a hearing outside the jury's presence regarding the admissibility of defendant's statement, even if no specific request was made, where it should have been apparent to the court that defendant was objecting to the admission of the statement. Remanded for trial court to hold a hearing on the voluntariness of defendant's confession.

[People v. Depper, 256 Ill.App.3d 179, 629 N.E.2d 699 \(4th Dist. 1994\)](#) The two rationales for forfeiture doctrine are to avoid the delay and expense of an appeal where a claim is meritorious and to give the reviewing court the benefit of the judgment and observations of the trial court.

[In re D.B., 303 Ill.App.3d 412, 708 N.E.2d 806 \(1st Dist. 1999\)](#) The statutory requirement that a written report of social investigation be prepared within 60 days before a dispositional hearing ([705 ILCS 405/5-22\(1\)](#)) is not subject to forfeiture, even where the issue is not raised in the trial court. A defendant is not allowed to waive preparation of a presentence report. Thus, he "certainly . . . cannot forfeit [a presentence report] through some sort of procedural default."

[People v. Jones, 364 Ill.App.3d 1, 846 N.E.2d 947 \(1st Dist. 2005\)](#) A defendant's failure to respond to appellate counsel's Anders motion to withdraw as counsel on direct appeal does not result in a forfeiture of all future claims, such as those properly pursued in a post-conviction proceeding.

[People v. Armstead, 322 Ill.App.3d 1, 748 N.E.2d 691 \(1st Dist. 2001\)](#) The failure to raise a contemporaneous objection to each of a series of statements forfeits appellate review of the statements for which objections were not raised, even where prior objections were overruled. Because the evidence was closely balanced, however, the court applied the plain error rule.

**In re Samantha V.**, 234 Ill.2d 359, 917 N.E.2d 487 (2009)

1. The court reiterated that the “one-act, one-crime” rule applies in juvenile proceedings. (See **JUVENILE**, §§33-5(a), 33-9.)

2. In order to preserve a claim of error for review, a minor must object at trial. However, minors are not required to file post-adjudication motions.

The plain error doctrine allows a reviewing court to consider unpreserved error where the evidence is closely balanced or the error so serious as to affect the fairness of the trial and the integrity of the judicial process. Under either test, the defendant has the burden of persuasion. Before considering whether the plain error exception applies, the court must first determine whether any error occurred.

Here, the minor carried her burden to show that plain error occurred based upon the second prong of the plain error rule – because a “one-act, one-crime” violation affects the integrity of the judicial process.

**People v. Cregan**, 2014 IL 113600 (No. 113600, 2/21/14)

To preserve an issue for review, a party must raise the issue at trial and in a written post-trial motion. However, three types of claims are not subject to forfeiture for failing to file a post-trial motion: (1) constitutional issues that were properly raised at trial and which may be raised in a post-conviction petition; (2) challenges to the sufficiency of the evidence; and (3) plain errors. The court rejected the argument that the constitutional-issue exception applies only to capital cases, finding that the exception is intended to advance interests of judicial economy.

Whether the Fourth Amendment was violated by a search of defendant’s luggage incident to his arrest was a constitutional issue which could be raised in a post-conviction petition. Therefore, defendant did not waive the issue although he failed to raise it in a post-trial motion.

(Defendant was represented by former Assistant Defender Amber Corrigan, Springfield.)

**People v. Hernandez**, 2016 IL 118672 (No. 118672, 5/19/16)

Judicial estoppel is an equitable doctrine used by the court at its discretion to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment. Judicial estoppel applies when litigants take a factual position, benefit from that position, then take a contrary factual position in a later proceeding. The core concern in judicial estoppel is that a party takes factually inconsistent positions.

Defendant argued that the State was judicially estopped from arguing on appeal that armed robbery with a dangerous weapon did not have the identical elements as armed violence with a category III weapon, which includes bludgeons, since it charged defendant at trial with committing armed robbery with a bludgeon.

The Supreme Court held that judicial estoppel did not apply because while the State took a factual position at trial by arguing that the weapon was a bludgeon, it took a legal position on appeal when it argued that the two statutes did not have identical elements. The State did not take factually inconsistent positions at trial and on appeal and hence was not estopped.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

**People v. Hillier, 237 Ill.2d 539, 931 N.E.2d 1184 (2010)**

1. The plain error rule is a narrow exception to the forfeiture doctrine, and requires a defendant to show either that the evidence is closely balanced or the error is so egregious as to deny a fair proceeding. Under either test, the defendant has the burden of persuasion.

Where the State asserts that the defendant has forfeited review of an issue, the reviewing court must first determine whether forfeiture occurred. If so, the court must hold the defendant to his burden of demonstrating plain error. Here, the Appellate Court erred by neglecting to deal with the merits of the forfeiture claim, and instead writing an opinion dealing with the merits of issues raised for the first time on appeal.

2. A defendant who fails to make any argument for plain error in the reviewing court “obviously cannot meet his burden of persuasion,” and therefore forfeits plain error review. Here, defendant forfeited any plain error argument where his only response to the State’s forfeiture argument was to argue that the State was guilty of forfeiture by failing to raise its argument in the Appellate Court.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

**People v. Hughes, 2015 IL 117242 (No. 117242, 12/17/15)**

Defendant, who was charged with first degree murder, moved to suppress statements which he made during police interrogations after he was brought from Michigan to Chicago. The motion alleged several grounds, including that: (1) defendant was not properly advised of his **Miranda** rights, (2) defendant was incapable of appreciating and understanding the full meaning of **Miranda** rights, (3) the statements were obtained during interrogations which continued after defendant exercised his right to silence and/or elected to consult with an attorney, (4) the statements were obtained through psychological, physical and mental coercion, and (5) the statements were involuntary.

At the hearing on the motion to suppress, trial counsel acknowledged the breadth of the motion to suppress and stated that the defense would proceed on two theories: (1) that defendant’s hands had been handcuffed in a very uncomfortable position for the 90-minute drive to Chicago, and (2) that detectives questioned defendant on that drive without informing him of his **Miranda** rights and without making a video recording. Trial counsel stated, “I just want to give notice to counsel those are the grounds we will be proceeding on.”

The trial court denied the motion to suppress, finding that the statements were not coerced and that the detectives testified credibly that they had given defendant **Miranda** warnings. Defendant’s posttrial motion stated that the trial court erred by denying the motion to suppress, without any amplification.

On appeal, defendant raised several issues concerning his statements, including that his statements were involuntary because he was 19 years old, had only a ninth grade education, had not done well in school, had little to no sleep at the time of the statement, was suffering from severe emotional distress due to the death of his grandfather, and was the victim of deceptive and coercive police conduct. Defendant also claimed that he was susceptible to suggestion due to substance abuse.

The Supreme Court held that the issues were waived because defendant had not presented them in the trial court.

1. Although the terms “forfeiture” and “waiver” have been used interchangeably, “waiver” is the voluntary relinquishment of a known right while “forfeiture” is the failure to comply with procedural requirements. Here, the claims which defendant raised on appeal,



while not factually “hostile” to the claims raised in the trial court, were “almost wholly distinct” from the issues litigated at trial. Under these circumstances, the issues raised on appeal were not preserved.

The Supreme Court stressed that due to the differences between the issues raised in the trial court and on appeal, the trial court did not have an opportunity to consider and rule on the bulk of the challenges which defendant made on appeal. Likewise, the State did not have an opportunity to present evidence or argument concerning the challenges that were raised on appeal. Although a defendant need not present identical arguments in the trial court and on appeal, “almost entirely distinct” contentions are improper.

2. In a concurring opinion, Justices Burke, Thomas, and Kilbride noted that the majority failed to address defendant’s plain error argument. However, the concurrence concluded that plain error did not occur.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

**[People v. Aguirre-Alarcon, 2016 IL App \(4th\) 140455 \(No. 4-14-0455, 8/3/16\)](#)**

The trial court imposed a fee to reimburse the county for the cost of appointed counsel without first conducting a hearing to determine defendant’s ability to pay as required by statute. [725 ILCS 5/113-3.1\(a\)](#). The Appellate Court held that although defendant failed to object to the fee, application of the forfeiture doctrine would be inappropriate where the trial court failed to follow the procedural safeguards contained in the statute.

(Defendant was represented by Assistant Defender Katherine Strohl, Ottawa.)

**[People v. Coleman, 2013 IL App \(1st\) 130030 \(No. 1-13-0030, 12/18/13\)](#)**

The State forfeited an alternative argument which it made in the Supreme Court where it failed to raise the argument in the trial court and expressly stated in that court that it was taking a more limited position.

**[People v. Cortez, 2012 IL App \(1st\) 102184 \(No. 1-10-2184, mod. op. 8/10/12\)](#)**

Defendant’s plea agreement was void where it included an essential element that was prohibited by Illinois law - the awarding of sentence credit for time which defendant served on an unrelated, consecutive sentence. Defendant did not forfeit the issue although he first raised it some 11 years after the guilty plea when he appealed the denial of a §2-1401 petition which sought to force the Department of Corrections to implement the trial court’s order granting the credit. A void sentence can be challenged at any time.

The court also rejected the argument that defendant was estopped from challenging the plea because he received the benefit of the bargain when he obtained the minimum possible sentence. The court found the argument to be “disingenuous” because Illinois law prohibits defendant from receiving the benefit of his bargain - sentence credit for time previously served on an unrelated, consecutive sentence.

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)

**[People v. Cowart, 2015 IL App \(1st\) 131073 \(No. 1-13-1073, 2/17/15\)](#)**

1. Defendant filed a post-conviction petition attacking his guilty plea by arguing that the trial court failed to properly admonish him that he would have to register as a sex offender. The State argued that defendant forfeited this issue by failing to raise it on direct appeal.

The Appellate Court rejected the State’s argument. Post-conviction claims that could have been raised on direct appeal are forfeited, but the failure to file any appeal at all does not

forfeit such issues. For purposes of post-conviction forfeiture, a summary remand on direct appeal for non-compliance with Rule 604(d) is treated as if defendant filed no appeal at all. Here, on direct appeal, defendant's case was remanded for compliance with Rule 604(d) and thus his direct appeal was the equivalent of filing no appeal at all. Defendant therefore did not forfeit his post-conviction claim.

2. The court also rejected the State's argument that defendant's second-stage post-conviction petition was properly dismissed because he provided no affidavits or other support for his claims. The State forfeits a non-jurisdictional procedural challenge to a post-conviction petition by failing to raise that challenge in its motion to dismiss.

Here the State made no argument in its motion to dismiss about the lack of affidavits or other support for defendant's claim. The court noted that had the State raised this issue in the circuit court, defendant could have supplied the affidavits. By failing to raise this issue, the State forfeited its argument on appeal.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

### **People v. Hughes, 2013 IL App (1st) 110237 (No. 1-11-0237, 12/18/13)**

The forfeiture doctrine applies where a party fails to make a timely assertion of a right. Forfeiture or procedural default precludes litigants from asserting on appeal an objection different from the one that was advanced in the trial court. However, where the trial court clearly had an opportunity to review the same essential claim that was later raised on appeal, there is no forfeiture.

The trial court had an opportunity to review the claim raised on appeal - the voluntariness of statements defendant gave at the police station after arriving in Illinois - although defense counsel stated at the suppression hearing that he would focus on the interrogation which occurred on the trip from trip to Illinois after defendant was arrested in Michigan. Because defendant asserted that the trial court erred by denying his motion to suppress his statements on the ground of involuntariness and the videotape of the interrogation in Illinois was admitted to evidence and viewed by the trial court, the lower court had an opportunity to review the essential claim that was presented on appeal. Therefore, forfeiture did not occur.

The court added that even if the claim was forfeited, the plain error rule would apply under the circumstances of this case.

(Defendant was represented by Assistant Defender Nicole Jones, Chicago.)

### **People v. McCoy, 2016 IL App (1st) 130988 (No. 1-13-0988, 9/15/16)**

At defendant's murder trial, the prosecution erred by cross-examining defendant with impeachment questions which it had neither the intention nor the ability to prove. The court concluded that the error was preserved despite the fact that in the post-trial motion, defense counsel erroneously stated that the State's assertion occurred during closing argument rather than during cross-examination. A post-trial motion must make a sufficiently specific allegation to give the trial judge an adequate opportunity to correct the error. This standard was satisfied where at trial the only reference to defendant's alleged threats occurred during cross-examination.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

### **People v. Rigsby, 405 Ill.App.3d 916, 940 N.E.2d 113 (1st Dist. 2010)**

1. A defendant who has been assessed a DNA analysis fee need not show that he actually paid the fee before he can challenge the fee on appeal. No such prerequisite is



contained in the statute.

2. A court that orders a defendant to provide a DNA sample and pay an analysis fee where a sample is already on file in the database exceeds its statutory authority. Such an order is void and not subject to forfeiture.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

### **People v. Tapia, 2014 IL App (2d) 111314 (No. 2-11-1314, 1/9/14)**

Defendant entered a negotiated guilty plea in exchange for the State's recommendation of a sentencing cap. At the sentencing hearing, the trial court relied upon incorrect information in the pre-sentence investigation report (PSI) which listed a prior conviction from Georgia as a felony rather than a misdemeanor. Defendant did not object to the court's actions, and filed no post-judgment motions or direct appeal.

Defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to correct the misinformation about the Georgia conviction. At a third-stage evidentiary hearing, the State introduced trial counsel's affidavit which stated that he reviewed the PSI with defendant and defendant never indicated that the description of the Georgia conviction as a felony was inaccurate. Defendant filed an affidavit stating that he did not receive a copy of the PSI until the day of sentencing when trial counsel asked him to quickly look it over. Defendant looked it over but did not notice any errors because he did not understand all the legalese. The circuit court denied the petition and defendant appealed.

The Appellate Court held that defendant forfeited his claim of ineffective assistance by failing to file any post-judgment motions or raise the claim on direct appeal. Ordinarily, forfeiture bars a post-conviction claim that could have been, but was not, raised on direct appeal. Here, support for the claim existed and it could have been raised in a post-judgment motion or on direct appeal. The record shows that defendant reviewed the PSI. Defendant also knew that his Georgia conviction was a misdemeanor. A defendant has the obligation to notify the sentencing court of any inaccuracies in the PSI. By failing to object to the misinformation in the PSI or the court's reliance upon that misinformation, defendant failed to preserve the issue.

Although defendant entered a partially negotiated plea, and thus could not have moved to reconsider his sentence on the sole ground of excessiveness, his claim is not that his sentence was excessive, but rather that due to counsel's ineffectiveness the trial court considered inaccurate information in imposing his sentence. Such claim could have been raised in a post-judgment motion and on direct appeal.

### **People v. Taylor, 409 Ill.App.3d 881, 949 N.E.2d 124 (1st Dist. 2011)**

1. To preserve an alleged error for appellate review, the defense must both object at trial and raise the issue in the post-trial motion. Although the reviewing court may reach an unpreserved error under the plain error doctrine, the defendant forfeits the right to plain error review where he fails to request such review. Here, defendant waived plain error review of several evidentiary issues by failing to make an adequate request in the reviewing court.

2. The court also held that two of the allegations of error would have been rejected on the merits had they been reached.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

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## **§56-1(b)**

### **Application of the Forfeiture Rule**

## **§56-1(b)(1)**

### **Failure to Raise an Objection During Trial; Delayed Trial Objection; Withdrawn Objection**

## **§56-1(b)(1)(a)**

### **Issue Forfeited**

**People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989) Defendant forfeited his claim concerning the prosecutor's closing argument where he did not object during trial, though he raised the issue in the post-trial motion. See also, **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) (no objection to argument during trial and issue mentioned only in general terms in the post-trial motion).

**People v. Collins**, 106 Ill.2d 237, 478 N.E.2d 267 (1985) Issues pertaining to the introduction of hearsay, impeachment on collateral matters, and prosecutor's closing argument were forfeited by defense's failure to object. See also, **People v. Williams**, 139 Ill.2d 1, 563 N.E.2d 431 (1990) (the failure to object to hearsay testimony during trial forfeited the issue for appeal, and also allowed the trier of fact to give that evidence its natural probative value); **People v. Green**, 125 Ill.App.3d 734, 466 N.E.2d 630 (4th Dist. 1984) (defendant forfeited double jeopardy claim where he failed to object to declaration of mistrial at his first trial "and more significantly . . . raised no objection at the start of the second trial. . ."); **People v. Struck**, 136 Ill.App.3d 842, 483 N.E.2d 1047 (1st Dist. 1985) (defendant forfeited hearsay claim).

**People v. Casillas**, 195 Ill.2d 461, 749 N.E.2d 864 (2000) Because the judge's failure to instruct the jury that the indictment was not evidence of guilt involved a non-constitutional right, counsel's failure to tender a proper instruction and object to its omission forfeited the issue.

**People v. Hasprey**, 194 Ill.2d 84, 740 N.E.2d 780 (2000) Defendant forfeited argument regarding the propriety of the trial judge's response to a jury note where defense counsel failed to object to the response or request a mistrial. Further, the judge was not obligated to declare a mistrial sua sponte where the judge's response cured any misunderstanding.

**People v. Sanders**, 56 Ill.2d 241, 306 N.E.2d 865 (1974) Where defense counsel failed to object to testimony concerning a prior inconsistent statement for which there was a lack of foundation, objection was forfeited though counsel moved to strike the testimony on the next day of trial. See also, **People v. Williams**, 28 Ill.2d 114, 190 N.E.2d 809 (1963).

**People v. Caballero**, 102 Ill.2d 23, 464 N.E.2d 223 (1984) Defendant forfeited claim that the prosecutor's closing argument was improper. Although defense counsel objected to the statement, the judge did not rule on the objection and counsel did not request a ruling or call the judge's attention to the fact that no ruling had been made. See also, **People v. Redd**, 173 Ill.2d 1, 670 N.E.2d 583 (1996).

**People v. Heard**, 187 Ill.2d 36, 718 N.E.2d 58 (1999) Defendant forfeited a **Batson** objection

where he failed to raise the issue until the post-trial motion. Challenges to the composition of a jury must be raised before the jury is sworn. See also [People v. Primm, 319 Ill.App.3d 411, 745 N.E.2d 13 \(1st Dist. 2000\)](#) (where the defense raises a **Batson** objection as to several veniremembers but the State offers explanations only as to some, defendant forfeits the issue for appeal unless he renews his objection for the veniremembers for whom no explanations were given; under some circumstances, however, the State's failure to offer explanations for all challenged veniremembers may be considered under the plain error rule).

[People v. Bull, 185 Ill.2d 179, 705 N.E.2d 824 \(1998\)](#) Defendant forfeited argument that the trial court erred by conducting in camera voir dire of a juror in defendant's absence, where the defense failed to object before the jury was sworn. "An accused may not sit idly by and allow irregular proceedings to occur without objection and afterwards seek to reverse his conviction by reason of those same irregularities."

[People v. Dandridge, 98 Ill.App.3d 1021, 424 N.E.2d 1262 \(5th Dist. 1981\)](#) Defense counsel's objection to the prosecutor's use of hearsay testimony as substantive evidence during closing argument was properly overruled; counsel did not object or seek to limit the use of the testimony when it was introduced, and objected for the first time during closing argument.

[People v. Camp, 128 Ill.App.3d 223, 470 N.E.2d 540 \(1st Dist. 1984\)](#) Defendant could not complain about the State's substantive use of out-of-court statements, which were introduced to show their effect on defendant, where counsel failed to request an instruction limiting the use of the statements.

[People v. Blackwell, 76 Ill.App.3d 371, 394 N.E.2d 1329 \(1st Dist. 1979\)](#) Defendant may not claim error because the judge sustained an objection to a question that was withdrawn.

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**Cumulative Digest Case Summaries §56-1(b)(1)(a)**

[People v. Betance-Lopez, 2015 IL App \(2d\) 130521 \(No. 2-13-0521, 2/27/15\)](#)

Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a less-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State's request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State's failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State's request was granted. Noting that defendant might have decided to not appeal had the State raised the issue below, the court declined to overlook the State's waiver.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

[People v. Denson, 2013 IL App \(2d\) 110652 \(No. 2-11-0652, 5/23/13\)](#)

An error in the admission of evidence is not preserved for review where there was no objection at trial, even if the evidence is the subject of a defense motion *in limine*, or a defense objection to a prosecution motion *in limine*, and the error is included in the post-trial motion. A trial court's ruling on a motion *in limine* is an interlocutory order that is subject to reconsideration by the trial court any time prior to or at trial. Therefore, a defendant cannot rely on the ruling on the motion *in limine* to preserve the error, but must contemporaneously object to the evidence at the time it is offered at trial.

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

**[People v. Martin, 408 Ill.App.3d 891, 946 N.E.2d 990 \(2d Dist. 2011\)](#)**

To preserve an issue for review, the defendant is required to both offer a specific objection at trial and raise the matter in the post-trial motion. An appellant who fails to ask the reviewing court to apply the plain error rule forfeits any argument concerning plain error.

Although a post-trial motion attacking the sufficiency of the evidence is not required to preserve a reasonable doubt issue, a claim that an out-of-court statement was improperly admitted cannot be recast as a reasonable doubt argument in order to avoid forfeiture.

(Defendant was represented by Panel Attorney Thomas Brandstrader, Chicago.)

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**§56-1(b)(1)(b)**

**Issue Not Forfeited**

**[People v. Zazzetta, 27 Ill.2d 302, 189 N.E.2d 260 \(1963\)](#)** The filing of a motion to suppress after the start of trial preserved the issue for appeal where it "was made as promptly as possible under the circumstances of the case."

**[People v. Hope, 184 Ill.2d 39, 702 N.E.2d 1282 \(1998\)](#)** Defendant did not forfeit issue regarding whether veniremembers should be asked about bias due to the interracial nature of the crime by raising it after eight prospective jurors had been questioned. Because the State failed to challenge the timeliness of defense counsel's inquiry, it forfeited any right to object to the timeliness of the defense action. Further, any "tardiness" in raising the issue did not preclude inquiry into potential interracial crime bias; "[a]ny inconvenience in making the inquiry of the two previously selected jurors would have been minor, considering its 'minimally intrusive' nature and the trial court's discretion to question the jurors collectively."

**[People v. Montgomery, 47 Ill.2d 510, 268 N.E.2d 695 \(1971\)](#)** Defendant was allowed to challenge the use of a 21-year-old conviction to impeach him at trial; though there was no objection during trial, the issue was raised and ruled upon in the motion for new trial.

**[People v. West, 294 Ill.App.3d 939, 691 N.E.2d 177 \(5th Dist. 1998\)](#)** Defendant did not forfeit argument that the State failed to establish a sufficient foundation for the admission of crime scene photographs, although defendant failed to object the first time the photographs were identified at trial, where he objected during trial to the use of the photos and raised the issue in the post-trial motion. "The issue is not whether a party objects to evidence when it is first

identified or referred to, but . . . whether an objection is made when the evidence is offered." Because defendant objected when the photographs were mentioned by various witnesses, when they were offered into evidence, and in his post-trial motion, he preserved the issue.

[People v. Epps, 143 Ill.App.3d 636, 493 N.E.2d 378 \(2d Dist. 1986\)](#) Defendant did not forfeit claim that a witness was incompetent to testify. Though defendant failed to object during trial, there was a preliminary competency hearing outside the presence of the jury. Further, defense counsel moved for a mistrial when the witness was found competent to testify.

[Chicago v. Burgard, 285 Ill.App.3d 478, 673 N.E.2d 1082 \(1st Dist. 1996\)](#) Defendant did not forfeit constitutional argument in ordinance violation case although he failed to present it until after the prosecution had rested, where the State failed to object to the timeliness of the motion, and the trial court ruled on its merits.

[People v. Pogue, 312 Ill.App.3d 719, 724 N.E.2d 525 \(1st Dist. 1999\)](#) Defendant did not forfeit issue regarding trial judge's erroneous denial of a defense request to question prospective jurors about potential bias if defendant did not testify at trial, though counsel did not submit a proposed question before voir dire began and did not object until after 19 veniremembers had been questioned and eight jurors selected.

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**Cumulative Digest Case Summaries §56-1(b)(1)(b)**

[People v. Denson, 2014 IL 116231 \(No. 116231, 11/20/14\)](#)

1. In criminal cases, an issue is preserved for review if it is raised in either a motion *in limine* or a contemporaneous trial objection and is included in the post-trial motion. Where the State filed a motion *in limine* to admit co-conspirator statements as an exception to the hearsay rule, defendant filed a response, and the trial court granted the motion *in limine* after a full hearing, the issue was preserved although defendant did not file his own motion *in limine*. The court stressed that the forfeiture rule is intended to encourage defendants to raise issues in the trial court, ensure that the trial court has an opportunity to correct any errors before the case is appealed, and prevent defendant from obtaining a reversal through his or her own inaction. In light of these purposes, the critical consideration is not which party initiated the motion *in limine*, but whether the issue was in fact litigated in the trial court:

Under these circumstances, requiring defendant to recaption and refile his response to the State's motion as a motion *in limine* of his own would accomplish precisely nothing, other than to clutter the record with duplicative pleadings. Because the trial court was given a full and fair opportunity to rule upon the issue through the State's motion *in limine* and the defendant's response, the issue was preserved when defendant placed it in his post-trial motion, without any need to file his own motion *in limine*.

2. Furthermore, where statements were admitted after the State's motion *in limine* was granted, defendant was not required to offer a contemporaneous objection when the evidence was presented at trial. Instead, defendant preserved the issue by filing a response to the motion *in limine* and placing the issue in the post-trial motion.

The court acknowledged that in civil cases, a contemporaneous trial objection is required to preserve an issue that has been litigated in a motion *in limine*. In criminal cases,

by contrast, the issue must be included in the post-trial motion but need not be the subject of a contemporaneous objection at trial. The court explained the difference in procedure by noting that a post-trial motion is required in all criminal cases but may or may not be required in civil cases.

The court also criticized the State for taking inconsistent positions in the trial court and on appeal. In the lower court, the State indicated that its purpose in filing the motion *in limine* was to avoid having the defense raise an objection at trial that would require the trial to be interrupted. “Given this, we have some difficulty now entertaining the State’s argument that defendant forfeited review of the contested statements by failing to make a contemporaneous trial objection, when insulating those statements from a contemporaneous trial objection was the State’s express objective. . . .” and implicit request.” The court added, “[W]e in no way can condone the State’s maneuvering in this case, and we strongly discourage the State from proceeding this way in the future.”

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

**In re Jovan A., 2014 IL App (1st) 103835 (No. 1-10-3835, 2/13/14)**

To preserve an issue for appeal, a criminal defendant must object at trial and raise the issue in a post-trial motion. In juvenile cases, the respondent must object at trial but need not include the issue in a post-adjudication motion. The court found where the respondent repeatedly objected to hearsay testimony when it was introduced, those objections were sufficient to preserve the issue for review although the respondent did not object again when the trial court improperly relied on the hearsay when finding that the minor was delinquent. The court stressed that the State cited no authority for the proposition that an evidentiary issue is forfeited unless the respondent objects during the court’s oral pronouncement at the verdict stage.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

**People v. Easley, 2012 IL App (1st) 110023 (No. 1-11-0023, 12/24/12)**

Defendant was convicted of unlawful use of a weapon by a felon, a Class 3 felony that was enhanced to Class 2 because the offense was a second or subsequent violation. [725 ILCS 5/111-3\(a\)](#) provides that when the State seeks an enhanced sentence because of a prior conviction, the charge must give notice to the defendant by stating its intent to seek an enhanced sentence and the prior conviction that will be used to seek the enhancement. An enhanced sentence is defined as a sentence which due to a prior conviction is increased from one level of offense to a higher level offense.

The court concluded that where defendant was charged with the Class 3 offense of unlawful use of a weapon by a felon, and the charge did not give notice that the State intended to seek a conviction for an enhanced Class 2 offense, the essence of the issue was whether the sentence imposed was proper. The court reached the issue as plain error, although the defense did not raise the question until asked by the Appellate Court during oral argument, because sentencing issues which affect substantial rights are excepted from the waiver doctrine. The court rejected the State’s argument that defendant was raising a challenge to the sufficiency of the charging document, and was therefore required to show prejudice because the challenge had not been raised in the trial court.

The court also held that reversal was required although the nine-year sentence which the defendant received for the Class 2 felony was within the authorized sentencing range for a Class 3 conviction. Even where the sentence imposed on an erroneous conviction would have been authorized for the correct conviction, the sentence must be vacated because the trial court



relied on an erroneous view of the authorized sentencing range.

The court vacated the enhanced Class 2 sentence and remanded the cause with directions to sentence the defendant to between two and 10 years in prison, the authorized sentencing range for the Class 3 felony of unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

**[People v. Hill, 402 Ill.App.3d 903, 934 N.E.2d 43, 2010 WL 2675077 \(1st Dist. 2010\)](#)**

The State filed its notice to seek the death penalty 247 days after arraignment in violation of the provision of Supreme Court Rule 416(c) that such notice be filed within 120 days of arraignment. Almost four years later, the defense filed a motion to strike the notice. The State argued that the defense had forfeited its motion due to that delay and that its motion was barred by the doctrine of laches.

1. Mere delay in filing the motion to strike did not result in forfeiture. The delay did not amount to acquiescence in the State's effort to seek the death penalty. The defense also filed a motion to bar the State from seeking the death penalty a year after the State filed its notice of its intent to seek the death penalty.

2. Laches is an equitable doctrine that precludes a litigant from asserting a claim when unreasonable delay in asserting the claim prejudices the other party. While defendant may have lacked diligence in asserting his claim, the State suffered no prejudice.

(Defendant was represented by Assistant Defender Steven Becker, Chicago.)

**[People v. Rodriguez, 402 Ill.App.3d 932, 932 N.E.2d 113, 2010 WL 2675047 \(1st Dist. 2010\)](#)**

The doctrine of laches bars a party from asserting a claim where the party neglected its right to assert the claim to the detriment of the other party. Laches requires lack of due diligence on the part of one party and prejudice to the other.

The doctrine of laches does not bar the State from asserting that the post-conviction hearing court erroneously granted co-defendant a new sentencing hearing, even though the State failed to appeal that ruling. Defendants can demonstrate no prejudice as a result of that failure to appeal. If the State had appealed, it would have been successful and the co-defendant would have not received a reduced sentence. Defendants would then have no claim that their sentences were unconstitutionally disparate to the reduced sentence of their co-defendant.

(Defendant was represented by Assistant Defender Rebecca Levy, Chicago.)

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**§56-1(b)(2)**

**Issue Raised in a Pretrial Motion *in Limine***

**[People v. Mason, 274 Ill.App.3d 715, 653 N.E.2d 1371 \(1st Dist. 1995\)](#)** Defendant preserved his objections to gang-related testimony by filing a pretrial motion in limine and a written post-trial motion, both of which were denied. Although several appellate court cases hold that an objection must be made at trial where a pretrial motion in limine was denied, the Court cited Supreme Court precedent as authority that an issue raised in both a motion in limine and the post-trial motion is preserved for review.

[In re Commitment of Sandry, 367 Ill.App.3d 949, 857 N.E.2d 295 \(2d Dist. 2006\)](#) Defendant did not forfeit Frye argument (regarding whether penile plethysmography has obtained sufficient acceptance in the relevant scientific field), although he merely filed a motion in limine, and did not raise an objection at trial when the State attempted to introduce the report of the expert who had relied on PPG testing.

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**Cumulative Digest Case Summaries §56-1(b)(2)**

[People v. Denson, 2014 IL 116231 \(No. 116231, 11/20/14\)](#)

1. In criminal cases, an issue is preserved for review if it is raised in either a motion *in limine* or a contemporaneous trial objection and is included in the post-trial motion. Where the State filed a motion *in limine* to admit co-conspirator statements as an exception to the hearsay rule, defendant filed a response, and the trial court granted the motion *in limine* after a full hearing, the issue was preserved although defendant did not file his own motion *in limine*. The court stressed that the forfeiture rule is intended to encourage defendants to raise issues in the trial court, ensure that the trial court has an opportunity to correct any errors before the case is appealed, and prevent defendant from obtaining a reversal through his or her own inaction. In light of these purposes, the critical consideration is not which party initiated the motion *in limine*, but whether the issue was in fact litigated in the trial court:

Under these circumstances, requiring defendant to recaption and refile his response to the State's motion as a motion *in limine* of his own would accomplish precisely nothing, other than to clutter the record with duplicative pleadings. Because the trial court was given a full and fair opportunity to rule upon the issue through the State's motion *in limine* and the defendant's response, the issue was preserved when defendant placed it in his post-trial motion, without any need to file his own motion *in limine*.

2. Furthermore, where statements were admitted after the State's motion *in limine* was granted, defendant was not required to offer a contemporaneous objection when the evidence was presented at trial. Instead, defendant preserved the issue by filing a response to the motion *in limine* and placing the issue in the post-trial motion.

The court acknowledged that in civil cases, a contemporaneous trial objection is required to preserve an issue that has been litigated in a motion *in limine*. In criminal cases, by contrast, the issue must be included in the post-trial motion but need not be the subject of a contemporaneous objection at trial. The court explained the difference in procedure by noting that a post-trial motion is required in all criminal cases but may or may not be required in civil cases.

The court also criticized the State for taking inconsistent positions in the trial court and on appeal. In the lower court, the State indicated that its purpose in filing the motion *in limine* was to avoid having the defense raise an objection at trial that would require the trial to be interrupted. "Given this, we have some difficulty now entertaining the State's argument that defendant forfeited review of the contested statements by failing to make a contemporaneous trial objection, when insulating those statements from a contemporaneous trial objection was the State's express objective. . . ." and implicit request." The court added, "[W]e in no way can condone the State's maneuvering in this case, and we strongly discourage the State from proceeding this way in the future."

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

[People v. Gist, 2013 IL App \(2d\) 111140 \(No. 2-11-1140, 3/11/13\)](#)

Where the State moved *in limine* to admit evidence of two prior incidents of domestic violence against the same victim named in the current charges, and the trial court denied the motion after hearing testimony concerning one of the incidents, the State waived any argument that evidence of the second incident should have been admitted even if the first incident was inadmissible. In the trial court, the State failed to argue that evidence of the second incident was admissible separately from the first incident. In addition, the State failed to raise the argument in its motion to reconsider.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

[People v. Maldonado, 398 Ill.App.3d 401, 922 N.E.2d 1211 \(1st Dist. 2010\)](#)

1. An issue is preserved for appeal by: (1) objecting at trial or raising the issue in a motion *in limine*, and (2) presenting the issue in a post-trial motion. The defendant preserved an issue concerning the admissibility of gang-related testimony where the State filed a motion *in limine* to admit the evidence for a limited purposes, defendant replied by objecting to the admission of gang evidence for any purpose, and the issue was raised in the post-trial motion.

2. Even had the defendant not preserved the issue, it would be reviewable as plain error because the evidence was closely balanced and the improper admission of gang related evidence could have affected the outcome of the case. (See **EVIDENCE**, §§19-2(b)(1), 19-5, 19-16).

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

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**§56-1(b)(3)**

**Failure to Include Issue in a Written Post-Trial Motion; Failure to Timely File a Written Post-Trial Motion**

**§56-1(b)(3)(a)**

**Issue Forfeited**

[People v. Young, 128 Ill.2d 1, 538 N.E.2d 461 \(1989\)](#) Defendant forfeited his claim regarding the State's use of a prior consistent statement where he did not raise the issue in the post-trial motion, though he objected during trial. See also, [People v. Salazar, 126 Ill.2d 424, 535 N.E.2d 766 \(1988\)](#); [People v. Furby, 138 Ill.2d 434, 563 N.E.2d 421 \(1990\)](#); [People v. Henderson, 142 Ill.2d 258, 568 N.E.2d 1234 \(1990\)](#); [People v. White, 181 Ill.App.3d 798, 537 N.E.2d 1315 \(1st Dist. 1989\)](#); [People v. Mitchell, 200 Ill.App.3d 969, 558 N.E.2d 559 \(5th Dist. 1990\)](#).

[People v. Friesland, 109 Ill.2d 369, 488 N.E.2d 261 \(1985\)](#) Defendant forfeited issue (regarding the production of accomplice's mental health records) by failing to assert it in the written post-trial motion, though counsel raised the issue during oral argument on the post-trial motion and defendant filed a pre-trial discovery motion requesting production of the documents.

[People v. Nelson, 41 Ill.2d 364, 243 N.E.2d 225 \(1968\)](#) Defendant forfeited issue concerning improper remarks to jury by a deputy sheriff; defense knew of the remarks before filing the written post-trial motion, but failed to raise the issue.

[People v. Christmas, 54 Ill.App.3d 612, 370 N.E.2d 65 \(1st Dist. 1977\)](#) Issue concerning judge's interrogation and rehabilitation of State witness was forfeited because it was not in the written post-trial motion. Though failing to object in front of the jury might be excused as a trial tactic, the failure to include the issue in the post-trial motion is inexcusable.

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**Cumulative Digest Case Summaries §56-1(b)(3)(a)**

[People v. Bowens, 407 Ill.App.3d 1094, 943 N.E.2d 1249 \(4th Dist. 2011\)](#)

1. Defendant waived the argument that the trial judge erred by denying a motion to excuse for cause the trial judge's husband. The court concluded that the issue was waived because, after the motion to excuse for cause was denied, counsel failed to exercise one of his two remaining peremptories. Although counsel had allocated the two remaining challenges for use against two prospective jurors whom he knew would be in the final panel, the Appellate Court found that he affirmatively acquiesced to the spouse's service.

2. The court rejected the argument that the trial court's failure to excuse her spouse for cause could be reached as plain error. Plain error analysis can apply only to procedural default – the failure to make a timely assertion of a known right – and not where the defense affirmatively acquiesces to an error. In the latter situation, defendant's only recourse is to challenge counsel's acquiescence as ineffective assistance.

3. Defense counsel waived the argument that the trial court erred by allowing the State's lead investigator to sit at the State's counsel table through the case, although the investigator testified after hearing the testimony of other witnesses. Counsel objected to the investigator's presence and filed a motion to exclude witnesses, but failed to raise the issue in the written post-trial motion.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

[People v. De La Hera, 2011 IL App \(3d\) 100301 \(No. 3-10-0301, 8/18/11\)](#)

Under [People v. Enoch, 122 Ill. 2d 176, 522 N.E.2d 1124 \(1988\)](#), an alleged trial error is preserved for appeal only if the defendant objects at trial and raises the error in a post-trial motion. The fact that an objection is made when evidence is introduced does not excuse the failure to include the issue in the post-trial motion.

The court acknowledged Appellate Court precedent that a post-trial motion is unnecessary to preserve issues which developed at a bench trial and which were raised before the trial court. It concluded, however, that such precedent is based on authority established before the enactment of the Criminal Code of 1963. The court found that **Enoch**, which was based on [725 ILCS 5/116-1](#), overruled precedent dispensing with the requirement of post-trial motions in bench trials.

Here, defendant waived issues arising from the admission of certain evidence in a bench trial because he failed to include the issues in a post-trial motion or argue that the plain error rule applied.

[People v. Gist, 2013 IL App \(2d\) 111140 \(No. 2-11-1140, 3/11/13\)](#)

Where the State moved *in limine* to admit evidence of two prior incidents of domestic violence against the same victim named in the current charges, and the trial court denied the motion after hearing testimony concerning one of the incidents, the State waived any argument that evidence of the second incident should have been admitted even if the first incident was inadmissible. In the trial court, the State failed to argue that evidence of the second incident was admissible separately from the first incident. In addition, the State failed to raise the argument in its motion to reconsider.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

**[People v. Martin, 408 Ill.App.3d 891, 946 N.E.2d 990 \(2d Dist. 2011\)](#)**

To preserve an issue for review, the defendant is required to both offer a specific objection at trial and raise the matter in the post-trial motion. An appellant who fails to ask the reviewing court to apply the plain error rule forfeits any argument concerning plain error.

Although a post-trial motion attacking the sufficiency of the evidence is not required to preserve a reasonable doubt issue, a claim that an out-of-court statement was improperly admitted cannot be recast as a reasonable doubt argument in order to avoid forfeiture.

(Defendant was represented by Panel Attorney Thomas Brandstrader, Chicago.)

**[People v. Richardson, 2011 IL App \(4th\) 100358 \(No. 4-10-0358, 11/29/11\)](#)**

Generally, any error relating to jury instructions is forfeited if the defendant does not object or proffer alternative instructions at trial. An exception exists for the failure to instruct on the elements of a crime. The decision whether to instruct the jury on a lesser offense rests with defendant and is one of trial strategy.

Defendant elected to represent himself at trial. Therefore he was responsible for his own representation and was held to the same standards as any attorney. The court had no duty to advise defendant to introduce a lesser-offense instruction *sua sponte* or to inform defendant of the possibility of introducing the jury instruction. Because defendant represented himself at trial, he could not have usurped the decision whether to tender the instruction. Therefore, no error occurred.

(Defendant was represented by Assistant Defender Gary Peterson, Springfield.)

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**§56-1(b)(3)(b)**

**Issue Not Forfeited**

**[People v. Segoviano, 189 Ill.2d 228, 725 N.E.2d 1275 \(2000\)](#)** Three issues were not forfeited although the post-trial motion was filed 32 days after the convictions instead of within the requisite 30-day period. The trial court ruled on the issues while it had jurisdiction over the case, and the issues involved potential and substantial prejudice to the defense.

**[People v. McCabe, 49 Ill.2d 338, 275 N.E.2d 407 \(1971\)](#)** Defendant was allowed to raise argument that marijuana statute was unconstitutional though the issue had not been raised in the written motion for new trial. The defense raised the issue in pre-trial motions, and defense counsel's remarks after trial would be considered an oral motion for arrest of judgment. See also, **[People v. Paris, 295 Ill.App.3d 372, 692 N.E.2d 848 \(4th Dist. 1998\)](#)** (defendant did not forfeit issue that he failed to raise in his first post-trial motion but did raise

in a subsequent motion to vacate the judgment).

[People v. Jones, 81 Ill.2d 1, 405 N.E.2d 343 \(1979\)](#) Defendant did not forfeit alleged instruction error by failing to include the issue in his post-trial motion where he objected to the instruction during trial. See also, [People v. Depper, 256 Ill.App.3d 179, 629 N.E.2d 699 \(4th Dist. 1994\)](#) (defendant did not forfeit his challenge to the sufficiency of the evidence, though the defense omitted the issue from the motion for new trial and instead included it in a motion for judgment **n.o.v.**, which was filed and argued on the same day as a motion for a new trial; the rationales for the forfeiture rule are satisfied where an issue is argued to the trial judge in a motion presented simultaneously with the post-trial motion).

[People v. Thompkins, 121 Ill.2d 401, 521 N.E.2d 38 \(1988\)](#) In a case where defendant was sentenced to death, the Court considered the merits of defendant's claims though he did not file a post-trial motion. The defense did not file a post-trial motion because defense counsel, the prosecutor, and the trial judge agreed that a defendant sentenced to death need not file a motion for new trial. Though this is not the law in Illinois, "it would be manifestly unfair to hold that defendant should have filed a post-trial motion . . . in light of his obvious reliance on the statements . . . that none was necessary." See also, [People v. Levesque, 256 Ill.App.3d 639, 628 N.E.2d 272 \(1st Dist. 1993\)](#) (defendant did not forfeit issue of defense counsel's ineffectiveness where he filed pro se post-trial motion six days late where defendant had been ready to file the motion on time, but acquiesced in the trial judge's request to discuss his complaints with trial counsel before filing the motion; because the motion would have been timely had defendant been allowed to file it when he first attempted to do so, "it would constitute a grave injustice . . . to hold the defendant, by following the wishes of the circuit court, has waived the issues raised in his post-trial motion").

[People v. Redd, 173 Ill.2d 1, 670 N.E.2d 583 \(1996\)](#) Claim that was omitted from pro se motion for new trial, but raised on limited remand for filing of post-trial motion, was preserved.

[People v. Maness, 184 Ill.App.3d 149, 539 N.E.2d 1368 \(4th Dist. 1989\)](#) The court considered issue regarding improper introduction of other-crimes evidence, though defendant did not raise the issue in a post-trial motion. A reviewing court has discretion to consider an issue, notwithstanding defendant's failure to file a motion for new trial, where a litigant has in some manner brought the error to the circuit court's attention. Here, defendant objected to the admission of the evidence before trial and at trial, and the evidence, if erroneously admitted, could substantially prejudice defendant. See also, [People v. Dickerson, 69 Ill.App.3d 825, 387 N.E.2d 806 \(1st Dist. 1979\)](#) (court considered issue not included in post-trial motion where defendant presented the issue to the trial court in motion to suppress, and error would be prejudicial).

[People v. Burnfield, 295 Ill.App.3d 256, 692 N.E.2d 412 \(5th Dist. 1998\)](#) Where defendant filed a motion to suppress, an evidentiary hearing was held, and defense counsel made an appropriate objection at trial, the issue was not forfeited although it was omitted from the post-trial motion. The written motion to suppress and the resulting evidentiary hearing were sufficient to preserve the issue. See also, [People v. Cox, 295 Ill.App.3d 666, 693 N.E.2d 483 \(4th Dist. 1998\)](#) (although defendant failed to raise the denial of a motion to suppress in his post-trial motion, the forfeiture doctrine is inapplicable where defendant raises a



constitutional issue that was argued at trial and which could be raised in a post-conviction petition).

[People v. Tucker, 183 Ill.App.3d 333, 539 N.E.2d 243 \(2d Dist. 1989\)](#) Though the issue was not raised in the post-trial motion, the court considered (and rejected) defendant's claim that he did not understandingly waive a jury.

[People v. Schultz, 173 Ill.App.3d 738, 527 N.E.2d 984 \(1st Dist. 1988\)](#) Defendant filed a timely post-trial motion, which was merely pro forma pending a review of the record by newly hired appellate counsel. After the statutory time period had run, the defense filed a supplemental motion and motion in arrest of judgement. The State did not object to either the initial or supplemental motions, and the trial judge ruled on the merits. Under these circumstances, defendant did not forfeit the argument at issue.

[People v. Raibley, 338 Ill.App.3d 692, 788 N.E.2d 1221 \(4th Dist. 2003\)](#) Issues raised on appeal were not waived although defendant's post-trial motion was filed more than 30 days after his conviction. By responding to the merits of the post-trial motion in the trial court, without claiming that the motion was untimely, the State forfeited any issue of timeliness.

[People v. Ellis, 309 Ill.App.3d 443, 722 N.E.2d 254 \(4th Dist. 1999\)](#) Despite defendant's failure to file a post-trial motion, the court reversed the trial court's order refusing to appoint counsel for an indigent defendant. The court elected to review the issue due to defendant's argument that "the trial court forced him to proceed pro se and deprived him of a substantial right."

[People v. Stevens, 297 Ill.App.3d 408, 696 N.E.2d 828 \(1st Dist. 1998\)](#) Where the trial court admonished defendant that he was required to file a motion to withdraw his plea but failed to advise him that any issue not included in the motion would be forfeited, issues omitted from the written motion were not forfeited.

[People v. Exson, 384 Ill.App.3d 794, 896 N.E.2d 844 \(1st Dist. 2008\)](#) Defendant did not forfeit a speedy trial claim although he failed to raise it in the post-trial motion. Defendant raised several objections in the trial court, and filed a motion to dismiss based on the claim. Because the trial court had ample opportunity to review the issue, and because the speedy trial statute implicates the constitutional right to a speedy trial, the court elected to reach the issue.

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#### **Cumulative Digest Case Summaries §56-1(b)(3)(b)**

[People v. Almond, 2015 IL 113817 \(No. 113817, 2/20/15\)](#)

Defendant did not forfeit his Fourth Amendment issue by failing to include it in a post-trial motion. Constitutional issues that were previously raised at trial and could be raised later in a post-conviction petition are not subject to forfeiture on direct appeal simply because they were not included in a post-trial motion.

(Defendant was represented by Assistant Defender Ginger Odom, Chicago.)

[People v. Cregan, 2011 IL App \(4th\) 100477 \(No. 4-10-0477, 11/29/11\)](#)

Although both a trial objection and a post-trial motion raising the issue are normally required to preserve an issue for appeal, constitutional issues which were properly raised at trial and which could be raised in a post-conviction petition may be reviewed on appeal even where the defendant failed to file a written post-trial motion. Because defendant challenged the search of his luggage in the trial court and could raise the issue in a post-conviction petition, the issue was not forfeited.

(Defendant was represented by Assistant Defender Amber Gray, Springfield.)

**[People v. McCoy, 2016 IL App \(1st\) 130988 \(No. 1-13-0988, 9/15/16\)](#)**

At defendant's murder trial, the prosecution erred by cross-examining defendant with impeachment questions which it had neither the intention nor the ability to prove. The court concluded that the error was preserved despite the fact that in the post-trial motion, defense counsel erroneously stated that the State's assertion occurred during closing argument rather than during cross-examination. A post-trial motion must make a sufficiently specific allegation to give the trial judge an adequate opportunity to correct the error. This standard was satisfied where at trial the only reference to defendant's alleged threats occurred during cross-examination.

(Defendant was represented by Assistant Defender Rebecca Cohen, Chicago.)

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**§56-1(b)(4)**

**Issue Not Raised in the Trial Court; Issue Raised for the First Time on Direct Appeal; Issue Not Subject to Forfeiture**

**§56-1(b)(4)(a)**

**Issue Forfeited**

**[People v. Stewart, 104 Ill.2d 463, 473 N.E.2d 1227 \(1984\)](#)** Defendant forfeited issue regarding the violation of his right to remain silent where there was no objection during trial or in the post-trial motion. See also, **[People v. James, 304 Ill.App.3d 52, 710 N.E.2d 484 \(2d Dist. 1999\)](#)** (defendant waived jury selection issue by failing to object to the prosecutor's inquiry of prospective juror and including the issue in the post-trial motion).

**[People v. LeMay, 35 Ill.2d 208, 220 N.E.2d 184 \(1966\)](#)** Alleged error concerning State's instruction on insanity was forfeited; defense attorney withdrew objections at instruction conference, and issue was not in post-trial motion.

**[People v. Taylor, 32 Ill.2d 165, 204 N.E.2d 734 \(1965\)](#)** Defendant forfeited claim that he was denied a speedy trial where the issue was not presented to the trial court. See also, **[People v. Harris, 33 Ill.2d 389, 211 N.E.2d 693 \(1965\)](#)** (the Court refused to consider an issue involving a search incident to an unlawful arrest; issue was not raised before the trial court).

**[People v. Fleming, 50 Ill.2d 141, 277 N.E.2d 872 \(1971\)](#)** The defense of entrapment cannot be raised for the first time on appeal.

**[People v. Roberts, 75 Ill.2d 1, 387 N.E.2d 331 \(1979\)](#)** Defendant forfeited challenge to a

defective attempt murder instruction. See also, [People v. Tannenbaum, 82 Ill.2d 177, 415 N.E.2d 1027 \(1980\)](#) (defective theft instruction); [People v. Armstrong, 183 Ill.2d 130, 700 N.E.2d 960 \(1998\)](#) (defendant forfeited issue regarding propriety of instructions at eligibility phase of a death hearing by neither raising an adequate objection nor including the issue in his post-trial motion); [People v. Washington, 127 Ill.App.3d 365, 468 N.E.2d 1285 \(1st Dist. 1984\)](#) (defendant forfeited issue concerning the failure to instruct the jury on self-defense); [People v. Pecka, 125 Ill.App.3d 570, 466 N.E.2d 404 \(5th Dist. 1984\)](#) (failure to instruct on defense of voluntary intoxication); [People v. Turner, 143 Ill.App.3d 417, 493 N.E.2d 38 \(1st Dist. 1986\)](#) (failure to instruct on lesser offense)).

[People v. Wells, 182 Ill.2d 471, 696 N.E.2d 303 \(1998\)](#) The State forfeited argument regarding the applicability of the "laches" doctrine where it did not assert the argument in the lower courts.

[People v. Keith M., 255 Ill.App.3d 1071, 625 N.E.2d 980 \(2d Dist. 1994\)](#) On appeal, the State may not urge reversal of a suppression order by invoking a theory that it did not advance at the trial level. Here, the State forfeited arguments in support of search and seizure where it failed to raise them in the trial court. The failure to raise the arguments below not only prevented the trial court from considering them but also deprived the defense of an opportunity to make an adequate record. But see [People v. Keller, 93 Ill.2d 432, 444 N.E.2d 118 \(1982\)](#).

[People v. Martinez, 317 Ill.App.3d 1040, 740 N.E.2d 1185 \(1st Dist. 2000\)](#) On appeal, the State may not assert explanations for its use of peremptories if those explanations were not raised in the trial court. Thus, the State's argument that readers of a particular publication might be predisposed to acquit could not be considered on appeal.

Furthermore, where at trial the State did not respond to a defense argument, its silence could be reasonably viewed as indicating agreement.

[People v. Centeno, 333 Ill.App.3d 604, 777 N.E.2d 529 \(1st Dist. 2002\)](#) Where the State never asserted in the trial court that police had probable cause to arrest defendant before his confession, the court refused to consider that argument when raised in oral argument. "The general rule that a prevailing party may raise, in support of a judgment, any reason appearing in the record does not apply when the new theory advanced is inconsistent with the position advanced below. . . . Because the State's probable cause argument is directly at odds with its position taken at the pretrial hearing, it will not be considered."

[People v. Capuzi, 308 Ill.App.3d 425, 720 N.E.2d 662 \(2d Dist. 1999\)](#) By failing to raise the issues in the trial court, the State forfeited arguments that the good faith exception applied and that defendants lacked standing to raise Fourth Amendment challenges. See also, [People v. Damian, 299 Ill.App.3d 489, 701 N.E.2d 171 \(1st Dist. 1998\)](#) (State forfeited any argument that the evidence was admissible under the "good-faith exception" where it failed to raise that argument during the hearing on the motion to suppress, in the motion to reconsider, during oral argument on the motion to reconsider, or in the notice of appeal; "[t]he failure of the prosecution to argue the good-faith exception before the trial judge deprived the judge of the opportunity to address such an argument or conduct any necessary hearing"); [People v. Thompson, 337 Ill.App.3d 849, 787 N.E.2d 858 \(4th Dist. 2003\)](#) (in appealing the trial court's ruling on a motion to suppress, the State forfeited its argument that officers had a sufficient

basis to make a **Terry** stop where it failed to assert that basis at the suppression hearing; the trial judge had no opportunity to consider the argument and the defendants had no opportunity to rebut it).

[People v. Stanbridge, 348 Ill.App.3d 351, 810 N.E.2d 88 \(4th Dist. 2004\)](#) Although the State asserted on appeal that defendant's motion for new trial had been untimely and therefore constituted a forfeiture of the issue raised on appeal, the State forfeited the forfeiture issue where it chose, in the trial court, to argue the untimely motion on the merits.

[People v. Walker, 22 Ill.App.3d 711, 318 N.E.2d 111 \(1st Dist. 1974\)](#) Defendant may not urge a different theory on appeal than that advanced at trial.

[People v. Spencer, 7 Ill.App.3d 1017, 288 N.E.2d 612 \(1st Dist. 1972\)](#) Defendant forfeited contention that trial judge should have recused himself because it was not raised at trial. Appellate court reviewed the entire record and found no prejudice.

[People v. Woodall, 333 Ill.App.3d 1146, 777 N.E.2d 1014 \(5th Dist. 2002\)](#) Although attorneys employed by the State's Attorney Appellate Prosecutor's office were not properly appointed to prosecute defendant, the issue was forfeited where defendant failed to object in the trial court or show that he was prejudiced. But see, [People v. Ward, 326 Ill.App.3d 897, 762 N.E.2d 685 \(5th Dist. 2002\)](#).

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**Cumulative Digest Case Summaries §56-1(b)(4)(a)**

[People v. Hughes, 2015 IL 117242 \(No. 117242, 12/17/15\)](#)

Defendant, who was charged with first degree murder, moved to suppress statements which he made during police interrogations after he was brought from Michigan to Chicago. The motion alleged several grounds, including that: (1) defendant was not properly advised of his **Miranda** rights, (2) defendant was incapable of appreciating and understanding the full meaning of **Miranda** rights, (3) the statements were obtained during interrogations which continued after defendant exercised his right to silence and/or elected to consult with an attorney, (4) the statements were obtained through psychological, physical and mental coercion, and (5) the statements were involuntary.

At the hearing on the motion to suppress, trial counsel acknowledged the breadth of the motion to suppress and stated that the defense would proceed on two theories: (1) that defendant's hands had been handcuffed in a very uncomfortable position for the 90-minute drive to Chicago, and (2) that detectives questioned defendant on that drive without informing him of his **Miranda** rights and without making a video recording. Trial counsel stated, "I just want to give notice to counsel those are the grounds we will be proceeding on."

The trial court denied the motion to suppress, finding that the statements were not coerced and that the detectives testified credibly that they had given defendant **Miranda** warnings. Defendant's posttrial motion stated that the trial court erred by denying the motion to suppress, without any amplification.

On appeal, defendant raised several issues concerning his statements, including that his statements were involuntary because he was 19 years old, had only a ninth grade education, had not done well in school, had little to no sleep at the time of the statement, was suffering from severe emotional distress due to the death of his grandfather, and was the

victim of deceptive and coercive police conduct. Defendant also claimed that he was susceptible to suggestion due to substance abuse.

The Supreme Court held that the issues were waived because defendant had not presented them in the trial court.

1. Although the terms “forfeiture” and “waiver” have been used interchangeably, “waiver” is the voluntary relinquishment of a known right while “forfeiture” is the failure to comply with procedural requirements. Here, the claims which defendant raised on appeal, while not factually “hostile” to the claims raised in the trial court, were “almost wholly distinct” from the issues litigated at trial. Under these circumstances, the issues raised on appeal were not preserved.

The Supreme Court stressed that due to the differences between the issues raised in the trial court and on appeal, the trial court did not have an opportunity to consider and rule on the bulk of the challenges which defendant made on appeal. Likewise, the State did not have an opportunity to present evidence or argument concerning the challenges that were raised on appeal. Although a defendant need not present identical arguments in the trial court and on appeal, “almost entirely distinct” contentions are improper.

2. In a concurring opinion, Justices Burke, Thomas, and Kilbride noted that the majority failed to address defendant’s plain error argument. However, the concurrence concluded that plain error did not occur.

(Defendant was represented by Assistant Defender Deborah Pugh, Chicago.)

#### **[People v. Thompson, 2015 IL 118151 \(No. 118151, 12/3/15\)](#)**

Defendant filed an untimely 2-1401 petition 17 years after his conviction and sentence. In his petition, defendant raised several issues challenging his representation at trial. The trial court denied the petition. On appeal, defendant abandoned the claims he raised in his petition and argued instead that the sentencing statute mandating natural life imprisonment (for murdering more than one person) was unconstitutional as applied to him since he was 19 years old at the time of the offense, had no criminal history, and impulsively committed the offense after years of abuse by his father.

Defendant argued that his as-applied constitutional challenge constituted a challenge to a void judgment. Since a voidness challenge can be raised at any time, defendant argued that his claim was excused from the two-year limitations period that ordinarily applies to 2-1401 petitions ([735 ILCS 5/2-1401\(a\), \(c\)](#)), and could be raised for the first time on appeal from the dismissal of his petition.

The Supreme Court disagreed. A voidness challenge to a final judgment under section 2-1401 is only available in two specific situations. First, a judgment is void where the court that entered the judgment lacked personal or subject matter jurisdiction. Second, a judgment is void when it based on a facially unconstitutional statute that is void ab initio. (A third type of voidness claim, where a sentence does not conform to statutory requirements, was recently abolished in [People v. Castleberry, 2015 IL 116916](#).)

Defendant did not rely on either of the two situations where a voidness challenge could be made. He did not argue that the court lacked jurisdiction or that the sentence mandating natural life was facially unconstitutional. Defendant’s claim was thus subject to the typical procedural bars of section 2-1401 and could not be raised for the first time on appeal from the dismissal of an untimely 2-1401 petition.

The court specifically rejected defendant’s argument that an as-applied constitutional challenge should be treated the same as a facial challenge and be equally exempt from ordinary forfeiture rules. A facial challenge requires a showing that the statute is

unconstitutional under any set of facts. An as-applied challenge, by contrast, only applies to the facts and circumstances of the particular case. In the latter case, it is paramount that the record be sufficiently developed in the trial court to establish the necessary facts for appellate review.

(Defendant was represented by Assistant Defender Tom Gonzalez, Chicago.)

**People v. Betance-Lopez, 2015 IL App (2d) 130521 (No. 2-13-0521, 2/27/15)**

Defendant was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse. At sentencing, the trial court declined to impose a sentence for aggravated criminal sexual abuse, finding that the conviction merged with predatory criminal sexual assault of a child. On appeal, the State argued for the first time that the trial court incorrectly concluded that aggravated criminal sexual abuse was a less-included offense of predatory criminal sexual assault of a child and asked the court to remand the cause for sentencing on the former count.

The court acknowledged that where a criminal defendant appeals a conviction, the reviewing court has authority to grant the State's request to remand for imposition of a sentence on a conviction that was improperly vacated under one-act, one-crime principles. However, the court concluded that defendant was prejudiced by the State's failure to raise the issue in the trial court because he would be subject to mandatory consecutive sentencing if the State's request was granted. Noting that defendant might have decided to not appeal had the State raised the issue below, the court declined to overlook the State's waiver.

(Defendant was represented by Assistant Defender Yasmin Eken, Chicago.)

**People v. Coleman, 2013 IL App (1st) 130030 (No. 1-13-0030, 12/18/13)**

The State forfeited an alternative argument which it made in the Supreme Court where it failed to raise the argument in the trial court and expressly stated in that court that it was taking a more limited position.

**People v. Daniel, 2013 IL App (1st) 111876 (No. 1-11-1876, 3/22/13)**

Issues not raised before the trial court are generally considered forfeited on appeal, a principle that applies to the State when it appeals a trial court's grant of a defendant's motion to suppress.

Where the State argued in the trial court that **Terry** allowed officers to handcuff the defendant during a traffic stop, it could not argue for the first time on appeal that the officers had probable cause to make an arrest and defendant was searched incident to that arrest. Because the State forfeited this argument, the Appellate Court refused to consider it as a basis to reverse the trial court's ruling on the motion to suppress.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

**People v. Hall, 2011 IL App (2d) 100262 (No. 2-10-0262, 12/9/11)**

Under [625 ILCS 5/11-501.2\(a\)\(1\)](#), blood alcohol test results are admissible in DUI prosecutions only if the tests were performed according to standards promulgated by the State Police. The court noted that the standards promulgated under §11-51.2 apply only to DUI offenses; at trials for other offenses, blood alcohol test results are to be received in evidence under the usual standards governing the admission of evidence.

However, the court refused to overrule the trial court's order excluding the evidence on the non-DUI counts against the defendant. The court concluded that the issue was forfeited because the State failed to raise it until appeal.



**[People v. Haywood, 407 Ill.App.3d 540, 944 N.E.2d 846 \(2d Dist. 2011\)](#)**

The State waived its argument, which it raised for the first time on appeal, that a traffic stop was justified by the possibility that the officer believed defendant was committing a violation by operating a vehicle with a malfunctioning turn signal. Generally, a party may not raise an issue on appeal which was not raised in the trial court. This rule applies to the State where it appeals the trial court's decision in favor of the defendant.

Allowing the State to present an argument for the first time on appeal prevents the defendant from presenting evidence which could have a bearing on the disposition. Here, had the State raised its "malfunction" theory in the trial court, defendant could have presented evidence and argument that a reasonable officer would not have believed that the turn signal was malfunctioning.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

**[People v. Taylor, 409 Ill.App.3d 881, 949 N.E.2d 124 \(1st Dist. 2011\)](#)**

1. To preserve an alleged error for appellate review, the defense must both object at trial and raise the issue in the post-trial motion. Although the reviewing court may reach an unpreserved error under the plain error doctrine, the defendant forfeits the right to plain error review where he fails to request such review. Here, defendant waived plain error review of several evidentiary issues by failing to make an adequate request in the reviewing court.

2. The court also held that two of the allegations of error would have been rejected on the merits had they been reached.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

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**§56-1(b)(4)(b)**

**Issue Not Forfeited**

**[People v. Woodard, 175 Ill.2d 435, 677 N.E.2d 935 \(1997\)](#)** Defendant did not forfeit \$5.00 per day credit against fine for pretrial custody though he failed to request the credit in the trial court.

**[People v. Bryant, 128 Ill.2d 448, 539 N.E.2d 1221 \(1990\)](#)** A "constitutional challenge to a statute can be raised at any time." Thus, defendant could challenge the statute under which he was convicted though he did not raise the issue in the trial court. **[People v. Christy, 139 Ill.2d 172, 564 N.E.2d 770 \(1990\)](#)** (defendant did not forfeit argument regarding the constitutionality of the penalties for armed violence based on kidnapping despite his failure to present the issue to the trial court); **[People v. Wooters, 188 Ill.2d 500, 722 N.E.2d 1102 \(1999\)](#)** (although defendant raised a single-subject challenge for the first time on appeal, the State conceded that "the constitutional dimension of the question permits this court to address" the argument); **[People v. Ferneti, 104 Ill.2d 19, 470 N.E.2d 501 \(1984\)](#)**. But see, **[People v. Starnes, 273 Ill.App.3d 911, 653 N.E.2d 4 \(1st Dist. 1995\)](#)** (**Bryant** rule applies only to statutes under which defendant was convicted, not to statutes involving collateral matters).

**[People v. Wagener, 196 Ill.2d 269, 752 N.E.2d 430 \(2001\)](#)** Defendant did not forfeit an **Apprendi** challenge, for purposes of direct appeal, although he failed to raise the issue at

trial. Not only was **Apprendi** decided more than two years after trial, but a party may challenge the constitutionality of a statute at any time. Compare [People v. Jackson, 199 Ill.2d 286, 769 N.E.2d 21 \(2002\)](#) (because a voluntary guilty plea waives the right to require the State to prove the elements of the crime beyond a reasonable doubt before the jury, a defendant who pleads guilty after being informed that an extended term is possible waives any **Apprendi** challenge to that sentence); [Hill v. Cowan, 202 Ill.2d 151, 781 N.E.2d 1065 \(2002\)](#) (same).

[People v. Keller, 93 Ill.2d 432, 444 N.E.2d 118 \(1982\)](#) Where in the trial court the State prevailed on the merits of a motion to suppress evidence, it did not forfeit the issue of defendant's standing though it did not raise the issue. The Court distinguished the case from [People v. Holloway, 86 Ill.2d 78, 426 N.E.2d 871 \(1981\)](#), where the State forfeited the standing issue, on grounds that defendant in [Holloway](#) had prevailed on his motion to suppress in the trial court. Where defendant prevailed in the trial court, it would be unfair to require him to rebut a new theory raised for the first time on appeal. But, here "it would be unfair to hold that the State, as the prevailing party, had waived any reason it might conceivably have argued in support of the trial court's favorable ruling." Because the State "had not made any contrary assertion regarding standing," but had prevailed on the motion without addressing the standing question at all, the issue was not forfeited.

[People v. Williams, 188 Ill.2d 293, 721 N.E.2d 524 \(1999\)](#) Defendant did not forfeit his double jeopardy argument by failing to raise it in response to the trial court's denial of the motion for a directed verdict or in the post-trial motion. The "goal of maintaining a sound body of precedent may override considerations of waiver"; here, it was appropriate to relax the forfeiture rule.

[People v. King, 151 Ill.App.3d 644, 503 N.E.2d 384 \(3d Dist. 1987\)](#) Defendant may raise a reasonable doubt argument on appeal though the issue was not raised in the trial court. See also, [People v. Zizzo, 301 Ill.App.3d 481, 703 N.E.2d 546 \(2d Dist. 1998\)](#); [People v. Gutierrez, 105 Ill.App.3d 1059, 433 N.E.2d 361 \(2d Dist. 1982\)](#); [People v. Depper, 256 Ill.App.3d 179, 629 N.E.2d 699 \(4th Dist. 1994\)](#).

[People v. Parker, 288 Ill.App.3d 417, 680 N.E.2d 505 \(4th Dist. 1997\)](#) Defense counsel's failure to raise his own ineffectiveness does not constitute forfeiture.

[People v. Ward, 326 Ill.App.3d 897, 762 N.E.2d 685 \(5th Dist. 2002\)](#) A case prosecuted by an attorney who is not properly acting as a prosecutor is void, and may be challenged on appeal even where no objection was raised in the trial court.

[People v. Despenza, 318 Ill.App.3d 1155, 744 N.E.2d 912 \(3d Dist. 2001\)](#) The court considered an issue regarding trial court's authority to order the DOC to withhold 50% of defendant's monthly income to pay court costs despite defendant's failure to raise it at trial or in the post-trial motion.

[In re E.C., 297 Ill.App.3d 177, 696 N.E.2d 846 \(4th Dist. 1998\)](#) Where the trial court committed a juvenile to DOC for a period in excess of that statutorily authorized, the unauthorized portion was void and could be challenged any time. Thus, counsel did not forfeit the issue by failing to raise it in the trial court. See also, [People v. Rankin, 297 Ill.App.3d](#)

[818, 697 N.E.2d 1246 \(4th Dist. 1998\)](#); [People v. Peacock, 359 Ill.App.3d 326, 833 N.E.2d 396 \(4th Dist. 2005\)](#).

[People v. Ousley, 297 Ill.App.3d 758, 697 N.E.2d 926 \(3d Dist. 1998\)](#) Although failing to object to a jury instruction forfeits any error concerning the propriety of that instruction, it does not forfeit the requirement of legally consistent verdicts. Thus, the court reversed verdicts acquitting defendant of a predicate offense but convicting him of a compound offense (because they are legally inconsistent), notwithstanding defendant's failure to object.

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**Cumulative Digest Case Summaries §56-1(b)(4)(b)**

[People v. Marshall, 242 Ill.2d 285, 950 N.E.2d 688 \(2011\)](#)

An order entered by a court exceeding its statutory authority is void and is not subject to forfeiture. Because the court exceeded its statutory authority in ordering defendant to pay the DNA fee where his DNA was already in the database pursuant to an earlier conviction, the order assessing the fee was void.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

[People v. Gray, 2016 IL App \(1st\) 134012 \(No. 1-13-4012, 5/18/16\)](#)

Defendant argued for the first time on appeal that the aggravated domestic battery statute ([720 ILCS 5/12-3.3\(a\), \(a-5\)](#)) was unconstitutional as applied to him. The court held that it could address this issue even though it was being raised for the first time on appeal.

In [Thompson, 2015 IL 118151](#), the Illinois Supreme Court held that unlike a facial constitutional challenge to a statute, which may be raised at any time, the defendant could not raise an as-applied constitutional challenge to his sentence for the first time on appeal from the dismissal of his 2-1401 petition. While a facial challenge argues that the statute is unconstitutional under any set of facts, an as-applied challenge argues that the statute is unconstitutional only under the specific facts of the case. Because as-applied challenges are dependent on specific facts, the record must be sufficiently developed to allow appellate review.

Despite defendant's failure to raise this issue below, the court held that the record here was sufficiently developed to review the claim. At trial, the parties thoroughly explored defendant's relationship with the victim and provided a complete basis to analyze the as-applied constitutional attack.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)

[People v. Holmes, 405 Ill.App.3d 179, 937 N.E.2d 762 \(3d Dist. 2010\)](#)

A sentence that does not conform to a statutory requirement is void, and can be attacked at any time. A judgment is void, as opposed to voidable, if the court that entered it lacked jurisdiction. The jurisdictional failure may be due to the absence of personal or subject matter jurisdiction, or to a lack of authority to render the particular judgment in question.

The trial court lacked authority to order Class X sentencing under [730 ILCS 5/5-5-3\(c\)\(8\)](#) where the defendant was awaiting sentencing on his second offense when he committed the act which constituted the third offense. Therefore, the Class X sentence was void and could be challenged on appeal although defendant had not raised the issue in the trial court.

Defendant's Class X sentence for unlawful delivery of a controlled substance was vacated, and the cause was remanded for resentencing.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

**People v. Weathers, 2015 IL App (1st) 133264 (No. 1-13-3264, 11/25/15)**

Defendant filed a *pro se* motion for leave to file a successive post-conviction petition arguing that newly discovered evidence supported his claim of ineffective assistance of trial counsel. Defendant argued that his trial counsel was ineffective for withdrawing a motion to suppress his statements since the new evidence supported his claim that his confession had been coerced and that he was deprived of due process. The circuit court denied his motion.

On appeal, defendant argued that the trial court erred in denying his motion since the new evidence supported his claim that the State violated his due process rights by using a physically coerced confession. The State argued that defendant forfeited his appellate claim because in his post-conviction petition he framed the issue as ineffective assistance, not a due process violation.

The Appellate Court rejected the State's argument. Although the petition was framed as an ineffective assistance claim, it also consistently contended that defendant was subjected to physical coercion and that due process of law requires the suppression of a coerced confession. Under a liberal construction of the petition, the court found that defendant alleged a due process violation. Accordingly, the claims on appeal were substantially the same as the claims in the petition and were not forfeited.

(Defendant was represented by Assistant Defender Lauren Bauser, Chicago.)

**People v. Wood, 2014 IL App (1st) 121408 (No. 1-12-1408, 7/23/14)**

Defendant argued on appeal that trial counsel provided ineffective assistance by requesting a finding of guilty but mentally ill without first presenting an insanity defense as required by statute, and by failing to call his expert to testify that defendant suffered from paranoid schizophrenia.

The State argued that defendant forfeited this particular claim of ineffective assistance by failing to raise it in his *pro se* post-trial motion which contained other claims of ineffective assistance. The Appellate Court rejected the State's argument, noting that the State did not "even acknowledge the obvious" problem with its argument, which would have required defense counsel to object to his own ineffectiveness. Carried to its logical extreme, the State's argument would mean that all ineffectiveness claims would be forfeited, since counsel would seldom if ever object to his own representation.

The court further questioned the entire premise of the State's argument. According to the State, if a defendant raised some claims of ineffectiveness in a *pro se* motion, other claims of ineffectiveness would be forfeited; if a defendant raised no claims of ineffectiveness, however, he would not have forfeited any ineffectiveness claims. The State cited no authority for its proposition, and the court noted that adopting such a rule would impose undue hardship on defendants who believe they have received ineffective assistance but cannot retain new counsel to present their claims.

The court also noted that ineffective assistance claims and the plain-error rule overlap because a successful claim of ineffective assistance would necessarily satisfy the second prong of the plain-error rule since ineffective assistance of counsel is considered a substantial impairment of fundamental rights.

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

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**§56-1(b)(5)**

**Objection on a Specific Ground; Objection on an Inconsistent or Different Ground**

**§56-1(b)(5)(a)**

**Generally**

[People v. Eyler](#), 133 Ill.2d 173, 549 N.E.2d 268 (1989) An objection on a specific ground waives all grounds not specified. See also, [People v. Enis](#), 139 Ill.2d 264, 564 N.E.2d 1155 (1990); [People v. Canaday](#), 49 Ill.2d 416, 275 N.E.2d 356 (1971); [People v. Stewart](#), 104 Ill.2d 463, 473 N.E.2d 1227 (1984); [People v. Harris](#), 146 Ill.App.3d 632, 497 N.E.2d 177 (2d Dist. 1986).

[People v. Caballero](#), 206 Ill.2d 65, 794 N.E.2d 251 (2002) The Court discussed the doctrine of judicial estoppel, which holds that a party who takes a particular factual position in one proceeding is estopped from assuming a contrary position in subsequent proceedings.

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**Cumulative Digest Case Summaries §56-1(b)(5)(a)**

[People v. Ealy](#), 2015 IL App (2d) 131106 (No. 2-13-1106, 12/29/15)

In a jury trial for first-degree murder, defendant adequately preserved the issue of the admissibility of his refusal to consent to DNA testing where he repeatedly argued in the trial court that the probative value of the evidence was substantially outweighed by the prejudicial effect. Although an issue is preserved for appellate review only where there is an objection at trial and the issue is included in the post-trial motion, the issue raised on appeal need not be identical to the objection raised at trial. Instead, a claim is preserved when it is clear that the trial court had an opportunity to rule on essentially the same issue.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

[People v. Mandarino](#), 2013 IL App (1st) 111772 (No. 1-11-1772, 6/28/13)

Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary. The Appellate Court concluded that defendant forfeited the issue where he did not argue at trial or in the post-trial motion that the testimony was inadmissible lay opinion. Although trial counsel raised other objections, appellate arguments that do not correspond to objections raised at trial are forfeited.

Even if the lay opinion was improperly introduced, the plain error rule did not apply. The court found that the evidence was not closely balanced where a video recording of the incident supported the trial court's finding that defendant's conduct was "unprovoked, unnecessary, and totally unacceptable." The video showed that the complainant did not threaten or move toward defendant or make any movement suggesting he was attempting to escape. At most, the only "aggressive behavior" displayed by the complainant was swearing at the defendant during a traffic stop, "something that police officers deal with often in their careers."

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### **§56-1(b)(5)(b) Issue Forfeited**

[People v. Eyler, 133 Ill.2d 173, 549 N.E.2d 268 \(1989\)](#) Defendant forfeited review of his argument regarding the improper introduction of "opinion" evidence, where defendant objected at trial on the ground of relevancy. See also, [People v. Killebrew, 55 Ill.2d 337, 303 N.E.2d 377 \(1973\)](#); [People v. Harp, 193 Ill.App.3d 838, 550 N.E.2d 1163 \(4th Dist. 1990\)](#).

[People v. O'Neal, 104 Ill.2d 399, 472 N.E.2d 441 \(1984\)](#) The State could not urge on appeal a ground in support of the trial court's refusal to give a certain defense tendered instruction, where at trial the State had relied on a different ground. See also, [People v. Franklin, 115 Ill.2d 328, 504 N.E.2d 80 \(1987\)](#).

[People v. Abata, 165 Ill.App.3d 184, 518 N.E.2d 1065 \(2d Dist. 1988\)](#) Defendant was precluded from raising an additional ground for the suppression of evidence where that ground was not included in his motion to suppress.

[People v. Harris, 146 Ill.App.3d 632, 497 N.E.2d 177 \(2d Dist. 1986\)](#) Where defendant objected to a jury instruction on a specific ground, he forfeited objection on a different ground.

[People v. Cowper, 145 Ill.App.3d 1074, 496 N.E.2d 729 \(2d Dist. 1986\)](#) Where defendant objected to evidence on the ground of hearsay, he waived objection on other grounds. See also, [People v. Gill, 169 Ill.App.3d 1049, 523 N.E.2d 1239 \(1st Dist. 1988\)](#).

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### **§56-1(b)(5)(c) Issue Not Forfeited**

[People v. Mohr, 228 Ill.2d 53, 885 N.E.2d 1019 \(2008\)](#) Defendant did not forfeit argument regarding jury instruction though he objected on different grounds at the instruction conference and in the post-trial motion. The Court did not need to decide how closely objections must be related to preserve an issue, because in this case the objections are "clearly close enough."

[People v. Heider, 231 Ill.2d 1, 896 N.E.2d 239 \(2008\)](#) Defendant did not forfeit the issue whether the trial court improperly considered mental retardation as an aggravating factor. In his motion to reconsider the sentence, defendant raised an issue that was not "completely different" than the issue raised on appeal, and the trial court had an opportunity to review the "same essential claim."

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### **Cumulative Digest Case Summaries §56-1(b)(5)(c)**

[People v. Burton, 409 Ill.App.3d 321, 947 N.E.2d 843 \(2d Dist. 2011\)](#)

The court refused to find that defendant forfeited an argument that the leaseholder of



an apartment lacked authority to consent to a warrantless search of the pocket of a coat stored in a closet, where defendant argued in the circuit court that she lacked authority to consent to search of the closet. Although his argument on appeal was more specific than the argument raised below, it still touched on the lack of valid consent for a warrantless search, and thus was not forfeited.

(Defendant was represented by Panel Attorney James Leven, Chicago.)

**[People v. Ealy, 2015 IL App \(2d\) 131106 \(No. 2-13-1106, 12/29/15\)](#)**

In a jury trial for first-degree murder, defendant adequately preserved the issue of the admissibility of his refusal to consent to DNA testing where he repeatedly argued in the trial court that the probative value of the evidence was substantially outweighed by the prejudicial effect. Although an issue is preserved for appellate review only where there is an objection at trial and the issue is included in the post-trial motion, the issue raised on appeal need not be identical to the objection raised at trial. Instead, a claim is preserved when it is clear that the trial court had an opportunity to rule on essentially the same issue.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

**[People v. Harris, 2014 IL App \(2d\) 120990 \(No. 2-12-0990, 5/22/14\)](#)**

To preserve an issue for appellate review, defendant must object at trial and include the issue in a post-trial motion. Under [Illinois Rule of Evidence 103\(a\)\(1\)](#), to properly object to the admission of evidence, a party must state the specific ground for the objection unless the specific ground is apparent from the record.

Here, the record showed that the specific grounds for defendant's objection (to the admission of a logbook showing that a Breathalyzer machine had been certified as accurate) was apparent from the context of the proceedings. When the State first attempted to enter the logbook into evidence, defense counsel objected on hearsay grounds. (A logbook is hearsay and thus would be admissible only where the State lays a proper foundation for its admission as an exception to the hearsay rule.) The court sustained the hearsay objection and the State attempted to lay a proper foundation.

Counsel again objected on the grounds that the logbook was not a business record. The court overruled this objection. Counsel continued to object to testimony about the logbook and the accuracy of the Breathalyzer, objections which the trial court characterized as a "continuing objection to the admissibility" of the logbook. In the post-trial motion, counsel preserved all objections made during trial, and during the hearing on the motion, counsel stated that the State did not lay a proper foundation.

Although counsel may not have specifically stated during trial or in the post-trial motion that she was objecting to the lack of a proper foundation, that ground was apparent from the context of the proceedings. And both the State and the trial court understood the nature of the objection. Defendant thus did not forfeit the issue.

(Defendant was represented by Supervisor Josette Skelnik, Elgin.)

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**§56-1(b)(6)**

**General Objection**

**§56-1(b)(6)(a)**

## Generally

[People v. Simms, 168 Ill.2d 176, 659 N.E.2d 922 \(1995\)](#) A general objection forfeits review of an error unless (1) the ground for the objection was clear from the record, (2) trial counsel was ineffective, or (3) there was plain error. Here, none of the exceptions applied to defendant's claim that a police officer illegally questioned him about an unrelated offense without notifying defense counsel. See also, [People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 \(1st Dist. 2007\)](#).

[People v. Thomas, 116 Ill.App.3d 216, 452 N.E.2d 77 \(1st Dist. 1983\)](#) General allegations in a written post-trial motion are insufficient to preserve an issue for appeal.

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### **§56-1(b)(6)(b) Issue Forfeited**

[People v. Thomas, 116 Ill.App.3d 216, 452 N.E.2d 77 \(1st Dist. 1983\)](#) The general allegation that the prosecutor's closing argument contained "prejudicial, inflammatory, and erroneous statements," without setting out the specific remarks complained of, did not preserve the issue. See also, [People v. Lann, 194 Ill.App.3d 623, 551 N.E.2d 276 \(1st Dist. 1990\)](#); [People v. Young, 133 Ill.App.3d 886, 479 N.E.2d 494 \(2d Dist. 1988\)](#); [People v. Gutierrez, 136 Ill.App.3d 774, 483 N.E.2d 944 \(1st Dist. 1985\)](#); [People v. Lann, 194 Ill.App.3d 623, 551 N.E.2d 276 \(1st Dist. 1990\)](#).

[People v. Rogers, 32 Ill.App.3d 788, 336 N.E.2d 784 \(4th Dist. 1975\)](#) Defendant's written post-trial motion was insufficient to preserve issue regarding an improper instruction where the motion did not specifically mention the instruction, and, instead, stated that counsel did not have a transcript and intended to present "any and all errors." If this was sufficient, the rationale behind post-trial motions would be destroyed. See also, [People v. Collins, 127 Ill.App.3d 236, 468 N.E.2d 1343 \(1st Dist. 1984\)](#).

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### **§56-1(b)(6)(c) Issue Not Forfeited**

[People v. Latto, 304 Ill.App.3d 791, 710 N.E.2d 72 \(1st Dist. 1999\)](#) Defendant's post-sentencing motion alleging that his sentence was "excessive" preserved the claim that his sentence had been increased because he went to trial.

[People v. Duff, 374 Ill.App.3d 599, 872 N.E.2d 46 \(1st Dist. 2007\)](#) Because defense counsel raised only a general objection, the Crawford objection could be deemed forfeited. But, the court reached the issue because the State did not contend that the general objection forfeited the confrontation issue.

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## §56-1(b)(7)

### Agreed to or Invited Error; Stipulated Evidence

## §56-1(b)(7)(a)

### Generally

[People v. Hawkins](#), 27 Ill.2d 339, 189 N.E.2d 252 (1963) Defendant may by stipulation waive proof by State, but having done so he cannot then complain of the evidence. See also, [People v. Daniels](#), 164 Ill.App.3d 1055, 518 N.E.2d 669 (2d Dist. 1987).

[Ohler v. U.S.](#), 529 U.S. 753, 120 S.Ct. 1851, 146 L.Ed.2d 826 (2000) In federal prosecutions, a criminal defendant who discloses a prior conviction on direct examination, even after the trial court has ruled that the conviction is admissible as impeachment, waives the right to appeal the propriety of that ruling. (Note: Under Illinois law, an appellant who discloses a prior conviction which the trial court has held admissible as impeachment may challenge the propriety of that ruling.) See [People v. Williams](#), 161 Ill.2d 1, 641 N.E.2d 296 (1994).

[People v. Carter](#), 208 Ill.2d 309, 802 N.E.2d 1185 (2003) Under the invited error doctrine, a party may not ask the trial court to proceed in a particular manner and then contend on appeal that the suggested course of action was erroneous. See also, [People v. Harvey](#), 211 Ill.2d 368, 813 N.E.2d 181 (2004). Because defendant objected to his attorney's request for a lesser- included offense instruction, he could not challenge the trial court's failure to give the instruction sua sponte.

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### Cumulative Digest Case Summaries §56-1(b)(7)(a)

#### [People v. Denson](#), 2014 IL 116231 (No. 116231, 11/20/14)

1. In criminal cases, an issue is preserved for review if it is raised in either a motion *in limine* or a contemporaneous trial objection and is included in the post-trial motion. Where the State filed a motion *in limine* to admit co-conspirator statements as an exception to the hearsay rule, defendant filed a response, and the trial court granted the motion *in limine* after a full hearing, the issue was preserved although defendant did not file his own motion *in limine*. The court stressed that the forfeiture rule is intended to encourage defendants to raise issues in the trial court, ensure that the trial court has an opportunity to correct any errors before the case is appealed, and prevent defendant from obtaining a reversal through his or her own inaction. In light of these purposes, the critical consideration is not which party initiated the motion *in limine*, but whether the issue was in fact litigated in the trial court:

Under these circumstances, requiring defendant to recaption and refile his response to the State's motion as a motion *in limine* of his own would accomplish precisely nothing, other than to clutter the record with duplicative pleadings. Because the trial court was given a full and fair opportunity to rule upon the issue through the State's motion *in limine* and the defendant's response, the issue was preserved when defendant placed it in his post-trial motion, without any need to file his own motion *in limine*.

2. Furthermore, where statements were admitted after the State's motion *in limine* was granted, defendant was not required to offer a contemporaneous objection when the evidence

was presented at trial. Instead, defendant preserved the issue by filing a response to the motion *in limine* and placing the issue in the post-trial motion.

The court acknowledged that in civil cases, a contemporaneous trial objection is required to preserve an issue that has been litigated in a motion *in limine*. In criminal cases, by contrast, the issue must be included in the post-trial motion but need not be the subject of a contemporaneous objection at trial. The court explained the difference in procedure by noting that a post-trial motion is required in all criminal cases but may or may not be required in civil cases.

The court also criticized the State for taking inconsistent positions in the trial court and on appeal. In the lower court, the State indicated that its purpose in filing the motion *in limine* was to avoid having the defense raise an objection at trial that would require the trial to be interrupted. “Given this, we have some difficulty now entertaining the State’s argument that defendant forfeited review of the contested statements by failing to make a contemporaneous trial objection, when insulating those statements from a contemporaneous trial objection was the State’s express objective. . . .” and implicit request.” The court added, “[W]e in no way can condone the State’s maneuvering in this case, and we strongly discourage the State from proceeding this way in the future.”

(Defendant was represented by Assistant Defender Chris McCoy, Elgin.)

#### **People v. Matthews, 2016 IL 118114 (No. 118114, 12/1/16)**

Under [Illinois Supreme Court Rule 105](#), when a defendant files a 2-1401 petition he must notify the State in person, by mail, or by publication. If by mail, service must be sent by certified or registered mail. Once properly served, the State waives any question about the petition’s sufficiency if it fails to respond within 30 days. Even if the State does not respond, the court may *sua sponte* dismiss a petition that is deficient as a matter of law. But the court may not *sua sponte* dismiss a petition before the 30-day response period expires.

Defendant filed a 2-1401 petition and served the State by regular first-class mail, not certified or registered mail. The circuit court received the petition on April 11, 2012 and docketed the petition on April 23, 2012. The court dismissed the petition on May 24, 2012. On appeal, defendant argued that the court prematurely dismissed the petition because he did not properly serve the State by certified or registered mail and thus the 30-day period for filing a response never commenced.

The Supreme Court held that defendant could not benefit from his own failure to comply with the service requirements of Rule 105. A defendant may not ask the trial court to proceed in a certain manner and then argue on appeal that the trial court’s action was error. Here, by filing a proof/certificate of service, defendant asked the trial court to proceed as though the State had been properly notified of the proceedings. Defendant was therefore estopped from alleging the trial court erred in acquiescing to this request.

Rule 105 was designed to prevent a litigant from obtaining relief without first giving the opposing party an opportunity to respond. It was not designed to allow a litigant to object to lack of service on behalf of the opposing party. A defendant thus cannot challenge the trial court’s order based on his own failure to properly serve the State.

The Supreme Court dismissed defendant’s 2-1401 petition.

(Defendant was represented by Assistant Defender Rachel Kindstrand, Chicago.)

#### **People v. Coan, 2016 IL App (2d) 151036 (No. 2-15-1036, 6/29/16)**

Under the invited-error doctrine, a defendant may not request to proceed in one manner at trial and later argue on appeal that error occurred. To permit a defendant to use

the exact ruling or action that he procured at trial as a means of reversal on appeal would offend notions of fair play and encourage duplicitous behavior. Even plain-error review is forfeited when a defendant invites the error.

Here defendant failed to object to an incorrect jury instruction tendered by the State. The court rejected the State's attempt to portray this as invited error. The State, not defendant, tendered the instruction, and the failure to object did not mean that defendant agreed on the record to using the instruction. In this circumstance, the issue should be reviewed under the plain error doctrine.

**[People v. Harding, 2012 IL App \(2d\) 101011 \(No. 2-10-1011, 2/21/12\)](#)**

1. Under the invited error doctrine, a party may not request to proceed in a certain manner and then contend on appeal that the course of action to which he agreed was erroneous. When the invited error doctrine applies, the plain error doctrine is inapplicable.

2. Although the trial judge erred by failing to place on the record specific reasons for requiring the defendant to appear in prison attire and shackling defendant's legs and one hand, defense counsel invited the error by stating that defendant's leg shackles could remain, asking that the hand shackles be removed to allow defendant to participate in trial by holding a pen, and accepting an arrangement by which only one of defendant's hands was unshackled. "By not asking for more, such as the removal of all shackles and prison attire, and in light of the deficiencies in the record [which did not show whether the hand which remained shackled was physically attached to anything], we view counsel's request as specifically limited to a request to remove enough items so that defendant could meaningfully participate in the trial."

Defendant's conviction for domestic battery was affirmed.

(Defendant was represented by Panel Attorney Carol Anfinson, Aurora.)

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**§56-1(b)(7)(b)  
Issue Forfeited**

**[People v. Segoviano, 189 Ill.2d 228, 725 N.E.2d 1275 \(2000\)](#)** Where trial counsel opposed the State's motion for a mistrial, defendant could not contend on appeal that the trial court abused its discretion by failing to order a mistrial. Although in rare cases an error may be so grave that a mistrial is required even over defense objection, this was not such a case.

**[People v. Villarreal, 198 Ill.2d 209, 761 N.E.2d 1175 \(2001\)](#)** Normally, a party who acquiesces in jury instructions may not subsequently claim that he was prejudiced by those instructions. Here, defense counsel's "[a]ctive participation in the direction of proceedings . . . goes beyond mere waiver," as defendant requested the very instructions to which he objected on appeal. See also, **[People v. Schickel, 347 Ill.App.3d 889, 807 N.E.2d 1195 \(1st Dist. 2004\)](#)** (although involuntary manslaughter may not be a lesser-included offense of felony murder, defendant forfeited the issue where defendant and defense counsel invited the trial court in bench trial (on charges of first and second degree murder), to consider involuntary manslaughter as a lesser included offense; because a defendant is "accountable for any mistakes he injects into his own trial," defendant's conviction of involuntary manslaughter constituted "invited" error).

[People v. Harvey](#) 211 Ill.2d 368, 813 N.E.2d 181 (2004) Defendants forfeited issue concerning the "mere-fact" method of impeachment by prior convictions where they either failed to object, requested, or acquiesced in the trial court's use of the mere-fact procedure.

[People v. Todd](#), 249 Ill.App.3d 835, 619 N.E.2d 1353 (5th Dist. 1993) The prosecution forfeited any objection to pro se defendant's failure to file a post-trial motion where the State suggested that the parties use the "stipulated bench trial" procedure so that defendant could preserve an issue for appeal, and by failing to object when the trial court admonished defendant that he could appeal merely by filing a notice of appeal.

[People v. Virgin](#), 9 Ill.App.3d 902, 293 N.E.2d 349 (1st Dist. 1973) Where defense counsel concurred in ruling by judge concerning jury request for exhibits and testimony, the issue was forfeited.

[People v. Daniels](#), 164 Ill.App.3d 1055, 518 N.E.2d 669 (2d Dist. 1987) Defendant could not contend on appeal that the introduction of certain evidence was error where he had stipulated to its admission at trial. See also, [People v. Bush](#), 214 Ill.2d 318, 827 N.E.2d 455 (2005) (stipulation to chemist's qualifications and his conclusion that the substance recovered from defendant was cocaine forfeited any challenge to the foundation for the chemist's opinion); [People v. Marlow](#), 303 Ill.App.3d 568, 708 N.E.2d 579 (3d Dist. 1999) (stipulation to evidence at sentencing hearing).

[People v. Rokita](#), 316 Ill.App.3d 292, 736 N.E.2d 205 (5th Dist. 2000) The court rejected the State's attempt to argue on appeal several matters it had conceded in the trial court. "The State cannot deny on appeal a fact it admitted in the trial court."

[In re Detention of Swope](#), 213 Ill.2d 210, 821 N.E.2d 283 (2004) Where defense counsel and the State agreed to use depositions to obtain information from DHS treatment providers who refused to discuss the treatment of a sexually violent person with experts appointed under [725 ILCS 207/55](#), defendant acquiesced in the procedure used in the trial court and could not claim on appeal that due process required the providers to discuss the case with defense experts.

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### **Cumulative Digest Case Summaries §56-1(b)(7)(b)**

[People v. Bowens](#), 407 Ill.App.3d 1094, 943 N.E.2d 1249 (4th Dist. 2011)

1. Defendant waived the argument that the trial judge erred by denying a motion to excuse for cause the trial judge's husband. The court concluded that the issue was waived because, after the motion to excuse for cause was denied, counsel failed to exercise one of his two remaining peremptories. Although counsel had allocated the two remaining challenges for use against two prospective jurors whom he knew would be in the final panel, the Appellate Court found that he affirmatively acquiesced to the spouse's service.

2. The court rejected the argument that the trial court's failure to excuse her spouse for cause could be reached as plain error. Plain error analysis can apply only to procedural default – the failure to make a timely assertion of a known right – and not where the defense affirmatively acquiesces to an error. In the latter situation, defendant's only recourse is to challenge counsel's acquiescence as ineffective assistance.

3. Defense counsel waived the argument that the trial court erred by allowing the



State's lead investigator to sit at the State's counsel table through the case, although the investigator testified after hearing the testimony of other witnesses. Counsel objected to the investigator's presence and filed a motion to exclude witnesses, but failed to raise the issue in the written post-trial motion.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

**[People v. Harding, 2012 IL App \(2d\) 101011 \(No. 2-10-1011, 2/21/12\)](#)**

1. Under the invited error doctrine, a party may not request to proceed in a certain manner and then contend on appeal that the course of action to which he agreed was erroneous. When the invited error doctrine applies, the plain error doctrine is inapplicable.

2. Although the trial judge erred by failing to place on the record specific reasons for requiring the defendant to appear in prison attire and shackling defendant's legs and one hand, defense counsel invited the error by stating that defendant's leg shackles could remain, asking that the hand shackles be removed to allow defendant to participate in trial by holding a pen, and accepting an arrangement by which only one of defendant's hands was unshackled. "By not asking for more, such as the removal of all shackles and prison attire, and in light of the deficiencies in the record [which did not show whether the hand which remained shackled was physically attached to anything], we view counsel's request as specifically limited to a request to remove enough items so that defendant could meaningfully participate in the trial."

Defendant's conviction for domestic battery was affirmed.

(Defendant was represented by Panel Attorney Carol Anfinson, Aurora.)

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**§56-1(b)(7)(c)**

**Issue Not Forfeited**

**[People v. Spates, 77 Ill.2d 193, 395 N.E.2d 563 \(1979\)](#)** Defendant properly preserved for review the question of the admissibility of his prior convictions, though he introduced the convictions himself after the trial court denied his motion in limine to prohibit the State from introducing them. Though a "party waives the right to raise an error action taken by the court at the instance of that party[,] it is quite another matter when, after an exclusionary motion is denied, the party himself raises a matter so as to lessen its impact, when the party knows that if he does not raise it, the opponent will." See also, **[People v. Brown, 172 Ill.2d 1, 665 N.E.2d 1290 \(1996\)](#)** (defendant's introduction of gang-related testimony after motion in limine denied).

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**Cumulative Digest Case Summaries §56-1(b)(7)(c)**

**[People v. Johnson, 2013 IL App \(2d\) 110535](#)** (Nos. 2-11-0535 & 2-11-0782 cons., 5/31/13)

1. Under Supreme Court Rule 451(c), where a jury instruction suffers from a substantial defect, claims of error are not subject to forfeiture on appeal. An erroneous instruction constitutes a substantial defect when the instruction creates a serious risk that the defendant was incorrectly convicted because the jury did not understand the applicable law, so as to threaten the fundamental fairness of the defendant's trial. To prevail on appeal, the defendant need not prove that the error in the instruction actually misled the jury. Plain error arises in two instances: (1) when the flawed instruction was provided in a case where the

evidence was closely balanced; or (2) when the flaw in the instruction is so grave or so serious that it denied the defendant a substantial right and undermined the integrity of the judicial process.

Defendant was tried in a joint trial for UUV by a felon and domestic battery. In addition, the jury heard evidence of two uncharged domestic batteries, as well as threats that accompanied those offenses. At the close of the case, the court instructed the jury that evidence of uncharged conduct could be considered “on the issues of defendant’s intent, motive, design, knowledge, absence of mistake, and propensity.” When the parties stipulated that defendant had been previously convicted of a felony, which qualified for admission solely to prove an essential element of the charge of UUV by a felon, the court advised the jury that the stipulation “can be used by you like any other evidence in this case to come to your verdict.”

These instructions were plain error because they undermined the integrity of the judicial process. At no time during the trial did the court explain to the jury the difference between the charged conduct and the uncharged conduct. As a result, the jury’s verdicts may have been based on the uncharged conduct. The court failed to tailor I.P.I. Crim. 4th No. 3.14 based on the evidence presented to make it clear that the jury should not consider the charged domestic battery, the uncharged domestic batteries, or the evidence of defendant’s threats, as propensity evidence on the UUV by a felon case, and that the jury could not consider the defendant’s felony conviction, the evidence of threats, or the evidence of defendant’s gun possession, as propensity evidence in the domestic violence case.

2. Plain-error review is forfeited when defendant invites the error. A defendant’s agreement to a procedure later challenged on appeal goes beyond mere waiver. Invited error is sometimes referred to as an issue of estoppel in that a defendant cannot request to proceed in one manner and later contend on appeal that the course of action was in error. To allow the defense to use the exact ruling it procured in the trial court as a vehicle for reversal on appeal would offend notions of fair play, encourage defendants to become duplicitous, and deprive the State of the opportunity to cure the defect.

The defense did not invite the error in the other-crimes instruction by agreeing that the instruction should not be modified. The prosecution tendered the flawed instruction and offered no suggestion to cure the defect when it was pointed out by the trial court. Defense counsel was not duplicitous, but was attempting to mitigate any confusion that could result from a convoluted instruction. At the point at which defense counsel agreed to the flawed instruction, it was too late to untangle the evidence to make it understandable to the jury and the only viable option was to grant a mistrial.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

#### **People v. Wood, 2014 IL App (1st) 121408 (No. 1-12-1408, 7/23/14)**

Defendant argued on appeal that trial counsel provided ineffective assistance by requesting a finding of guilty but mentally ill without first presenting an insanity defense as required by statute, and by failing to call his expert to testify that defendant suffered from paranoid schizophrenia.

The State argued that defendant forfeited this particular claim of ineffective assistance by failing to raise it in his pro se post-trial motion which contained other claims of ineffective assistance. The Appellate Court rejected the State’s argument, noting that the State did not “even acknowledge the obvious” problem with its argument, which would have required defense counsel to object to his own ineffectiveness. Carried to its logical extreme, the State’s argument would mean that all ineffectiveness claims would be forfeited, since counsel would seldom if ever object to his own representation.

The court further questioned the entire premise of the State's argument. According to the State, if a defendant raised some claims of ineffectiveness in a pro se motion, other claims of ineffectiveness would be forfeited; if a defendant raised no claims of ineffectiveness, however, he would not have forfeited any ineffectiveness claims. The State cited no authority for its proposition, and the court noted that adopting such a rule would impose undue hardship on defendants who believe they have received ineffective assistance but cannot retain new counsel to present their claims.

The court also noted that ineffective assistance claims and the plain-error rule overlap because a successful claim of ineffective assistance would necessarily satisfy the second prong of the plain-error rule since ineffective assistance of counsel is considered a substantial impairment of fundamental rights.

(Defendant was represented by Assistant Defender Robert Markfield, Chicago.)

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### **§56-1(b)(8)**

#### **Basis for Objection is Trial Judge's Conduct**

[People v. Nevitt, 135 Ill.2d 423, 553 N.E.2d 368 \(1990\)](#) "[A]pplication of the waiver rule is less rigid where the basis for the objection is the trial judge's conduct." Thus, the Court decided the merits of defendant's argument that the trial judge was biased in favor of the State, despite defendant's failure to raise this issue at trial. See also, [People v. Bedenkop, 252 Ill.App.3d 419, 625 N.E.2d 123 \(1st Dist. 1993\)](#) ("where the trial judge assumed the role of the prosecutor, defense counsel may have been too intimidated and afraid of being held in contempt to object to the errors"); [People v. Barrow, 133 Ill.2d 226, 549 N.E.2d 240 \(1989\)](#); [People v. Ramos, 318 Ill.App.3d 181, 742 N.E.2d 763 \(1st Dist. 2000\)](#) (defendant did not forfeit the argument that the trial judge was biased against him, although he failed to raise that issue in the trial court); [People v. Brown, 200 Ill.App.3d 566, 558 N.E.2d 309 \(1st Dist. 1990\)](#).

[People v. Dameron, 196 Ill.2d 156, 751 N.E.2d 1111 \(2001\)](#) Defendant did not forfeit argument that the sentencing judge erroneously relied on evidence outside the record in imposing a death sentence because application of the forfeiture doctrine is less rigid where the basis for the objection is the circuit judge's conduct. [People v. Davis, 185 Ill.2d 317, 706 N.E.2d 473 \(1998\)](#); [People v. Woolley, 205 Ill.2d 296, 793 N.E.2d 519 \(2002\)](#) (2002) (trial court abused its discretion at death hearing by informing a panel of prospective jurors that a previous jury had sentenced defendant to death in the same case; less stringent standard of forfeiture is applied where alleged error involves an act of the trial judge).

[People v. Kliner, 185 Ill.2d 81, 705 N.E.2d 850 \(1998\)](#) Forfeiture doctrine inapplicable where issue concerned trial court's responses to jury questions in defendant's absence. See also, [People v. Comage, 303 Ill.App.3d 269, 709 N.E.2d 244 \(4th Dist. 1999\)](#) (citing [Kliner](#), the court reached issue of trial court's failure to respond to jury's question).

[People v. Rowjee, 308 Ill.App.3d 179, 719 N.E.2d 255 \(1st Dist. 1999\)](#) Defendant did not forfeit issue regarding trial judge's improper private investigation before convicting defendant because the error concerned the judge's conduct.

[People v. Westpfahl, 295 Ill.App.3d 327, 692 N.E.2d 831 \(3d Dist. 1998\)](#) Improper questioning of a witness by trial judge was properly preserved "by registering an objection outside the presence of the jury and prior to the introduction of further evidence."

[People v. Crawford, 343 Ill.App.3d 1050, 799 N.E.2d 479 \(1st Dist. 2003\)](#) The court reviewed the trial judge's repeated interruptions of defense counsel's closing argument, notwithstanding the defense's failure to object.

[People v. West, 294 Ill.App.3d 939, 691 N.E.2d 177 \(5th Dist. 1998\)](#) Defendant did not forfeit his argument that the trial court improperly deliberated the case before the defense rested. Defendant raised the issue in the post-trial motion. And:

"We can understand why, during the closing moments of the [bench] trial before the court rendered its decision, defendant's counsel did not want to raise an issue regarding the court's comments. We would not expect, or require, a party to take that risk. We know that defendant did raise the issue at the first opportune moment, that being in his post-trial motion."

[People v. Peden, 377 Ill.App.3d 463, 878 N.E.2d 1180 \(1st Dist. 2007\)](#) The court considered the trial court's improper interference with defendant's trial strategy as plain error, although the defendant failed to object at trial or raise the issue in the post-trial motion, because a less rigid standard of waiver applies when an issue involves potential misconduct by the trial judge.

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#### **Cumulative Digest Case Summaries §56-1(b)(8)**

[People v. Johnson, 238 Ill.2d 478, 939 N.E.2d 475 \(2010\)](#)

1. Ordinarily, appellate review is waived unless the defendant both objected to an error at trial and raised the issue in the post-trial motion. The plain error rule allows a reviewing court to consider a forfeited claim when the evidence was so closely balanced that the error threatened to tip the scales of justice against the defendant, or where the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. Under the second test, the strength of the evidence is immaterial.

2. The second prong of the plain error rule was not satisfied where defendant failed to object when the trial court responded to a jury question without notifying the parties. Although criminal defendants have a general right to be present at every stage of the trial, the right to be present is not itself a substantial right under the Illinois or federal constitutions. Instead, it is a lesser right intended to secure substantial rights such as the right to confrontation, the right to present a defense, or the right to an impartial jury. Because the defendant failed to show that any of these underlying rights had been violated, responding to the note in the absence of defendant or his counsel was not such a serious error as to affect the fairness of the trial or the integrity of the judicial process.

The court acknowledged that historically, it granted a new trial whenever *ex parte* communication occurred between the trial judge and the jury. In recent years, however, it has moved away from that rule and requires a new trial only if the defendant suffered prejudice. Because the court's response to continue deliberations was well within the court's discretion and was not coercive, no prejudice occurred.

3. The court rejected defendant's argument that the failure to object to the *ex parte*

communication was protected by [People v. Sprinkle, 27 Ill.2d 398, 189 N.E.2d 295 \(1963\)](#). In [Sprinkle](#), the Supreme Court held that the failure to object may be excused where the trial court overstepped its authority in the presence of the jury or would have been unwilling to consider an objection.

The trial court did not overstep its authority by instructing the jury to continue deliberating. Furthermore, nothing in the record suggests that the trial court would have ignored an objection raised after the jury was dismissed, when defendant first became aware of the note. Under these circumstances, **Sprinkle** does not justify relaxing the forfeiture rule.

Defendant's conviction for criminal sexual abuse was affirmed.

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

[People v. McLaurin, 235 Ill.2d 478, \\_\\_\\_ N.E.2d \\_\\_\\_ \(2009\)](#) (No. 106736, 12/17/09)

1. To preserve a claim of error for review, counsel must both object to the error at trial and raise the error in the post-trial motion. Although judicial misconduct may provide a basis for excusing forfeiture, this rule is applied only where errors are so serious as to threaten the integrity of the judicial process. The court stressed that the rule allowing judicial misconduct to excuse a forfeiture, which was first recognized in [People v. Sprinkle, 27 Ill.2d 398, 189 N.E.2d 295 \(1963\)](#), is based not only on the difficulty of objecting to the trial court's improper actions, but due to the risk that the jury might view the defendant unfavorably due to his objection to the conduct of a judge.

The **Sprinkle** rule did not excuse defense counsel's failure to object to defendant's absence when the trial court considered several notes from the jury. Because the trial court did not overstep its authority in the presence of the jury and counsel was in no way prevented from objecting, there were no extraordinary compelling reasons to relax the forfeiture rule.

2. The plain error doctrine allows a reviewing court to remedy a clearly obvious error, despite a waiver, where the evidence is so closely balanced that the jury's verdict may have resulted from the error, or where the error is so serious that the defendant was denied a substantial right and thus a fair trial. Before addressing either prong of the plain error doctrine, the court must first determine whether a clear or obvious error occurred.

The court concluded that plain error did not occur where the trial court responded to communications from the jury in defendant's absence but in the presence of counsel, or when the judge sent a bailiff to deliver a message to the jury. (See **JURY**, §§32-6(a), (c)).

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

[People v. Thompson, 238 Ill.2d 598, 939 N.E.2d 403 \(2010\)](#)

Supreme Court Rule 431(b) requires the trial court to ask each potential juror whether he or she understands and accepts the presumption of innocence, the reasonable doubt standard, that the defendant need not present any evidence, and that the defendant's failure to testify cannot be held against him. The court found that defendant forfeited the issue by failing to raise it in the trial court, and that the forfeiture was not excused.

1. A violation of Rule 431(b) does not constitute "structural" error which requires reversal in every case. An error is structural only if it necessarily makes the trial fundamentally unfair or unreliable as a means of determining guilt or innocence. Only a limited number of errors are considered structural; examples include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction.

The court noted that in [People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 \(2009\)](#), it



held that the failure to comply with an earlier version of Rule 431(b) was not structural error. The court concluded that the same reasoning applies to the amended version of the rule.

Although structural error would occur if a defendant was forced to stand trial before a biased jury, Rule 431(b) is but one method of insuring a fair jury. Thus, the failure to comply with Rule 431(b) does not necessarily result in a biased jury and unfair trial. Because the error does not in and of itself render the trial unreliable, the error is not structural.

2. Similarly, the forfeiture could not be excused under the “fundamental error” prong of the plain error rule. To satisfy this test, a clear or obvious error must have been so serious as to affect the fairness of the trial and challenge the integrity of the judicial process.

Because compliance with Rule 431(b) is not indispensable to a fair trial, the mere failure to comply with Rule 431(b) does not necessarily affect the fairness of the trial or challenge the integrity of the process. Thus, the plain error rule does not apply.

3. The court rejected the argument that defendant was excused from objecting to the noncompliance with Rule 431(b) under the **Sprinkle** doctrine, which relaxes the forfeiture rule where the trial court oversteps its authority in the presence of the jury or would not have been willing to consider an objection. There was no reason to believe that the trial court would have ignored an objection or would have refused to follow Rule 431(b) had the issue been raised.

4. Finally, the court rejected the argument that a “bright line” rule requiring reversal is necessary to force trial courts to comply with Rule 431(b). The court stressed that most cases in which trial courts failed to follow Rule 431(b) arose immediately after the rule was amended, and there is no reason to believe that trial judges are reluctant to follow the rule.

Defendant’s conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Elena Penick, Chicago.)

#### **People v. Faria**, 402 Ill.App.3d 475, 931 N.E.2d 742 (1st Dist. 2010)

1. Although the forfeiture rule may be relaxed where an unpreserved issue concerns actions taken by the trial court, forfeiture should be ignored only in the most compelling situations, such as where a judge makes inappropriate remarks to the jury or the case involves capital punishment. (**People v. McLaurin**, 235 Ill.2d 478, 922 N.E.2d 344 (2009)). Here, the forfeiture rule was not relaxed although the trial judge “took over” defense counsel’s cross-examination and interrupted counsel repeatedly.

First, because defendant was convicted in a bench trial, there was no jury to be influenced. However, “[h]ad this been a jury trial, we may well have reached a different decision.”

Furthermore, the trial judge did not act in counsel’s absence or in any way prevent objections from being made.

2. The plain error rule applies to a forfeited issue which affects the substantial rights of a defendant, if the evidence is so closely balanced that the guilty verdict might have resulted from the error or the error is so serious that the defendant was denied a substantial right and a fair trial. To determine whether plain error occurred under the latter test, the court must first determine whether a clear or obvious error occurred.

Here, no clear or obvious error occurred. Thus, the plain error rule did not apply.

#### **People v. Ware**, 2014 IL App (1st) 120485 (No. 1-12-0485, 3/14/14)

1. The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Although this was error, it was not reversible under the second prong of



the plain-error doctrine.

Errors under the second prong are presumptively prejudicial and require automatic reversal only if they are structural, i.e., systemic errors that serve to erode the integrity of the judicial process and undermine the fairness of the trial. A jury instruction error is plain error only when it creates a serious risk the jurors incorrectly convicted defendant because they did not understand the applicable law.

The instructions here misdescribed an element of the offense by referring to a “dangerous weapon,” rather than a “firearm.” But a firearm is still a class of dangerous weapon, and the jury’s verdict, based on substantial evidence that defendant carried a firearm, implicitly found that defendant was armed with a firearm. The error thus did not create a substantial risk that the jurors incorrectly convicted defendant because they did not understand the applicable law.

2. Defendant also argued that the trial court improperly refused to consider a plea agreement the parties reached after the trial had commenced. Defendant forfeited the issue by failing to object at trial, but argued that forfeiture should not apply because the error involved conduct by the trial judge.

Although judicial misconduct may provide a basis for relaxing forfeiture under the **Sprinkle** doctrine, this exception applies only in extraordinary situations, such as when a judge makes inappropriate comments to the jury. The judge’s conduct here did present extraordinary or compelling reasons to relax the forfeiture rule.

The conviction was affirmed.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

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#### **§56-1(b)(9)**

**Issue Not Raised in Original Appellate Brief; Issue Not Raised in Reply Brief; Issue Not Raised in Petition for Rehearing; Issue Not Raised in Petition for Leave to Appeal**

#### **§56-1(b)(9)(a)**

**Issue Forfeited**

[People v. Anderson](#), 112 Ill.2d 39, 490 N.E.2d 1263 (1986) The Court refused to consider an issue regarding the validity of defendant's conviction, where defendant challenged his conviction and sentence before the appellate court but defendant's petition for leave to appeal raised only the sentencing issue and asked for a new sentencing hearing. While a reviewing court has discretion to consider such issues, review was unnecessary in light of the limited relief requested in defendant's petition and the fact that the arguments made before the Court were identical to those that the appellate court examined and rejected. See also, [People v. Ward](#), 113 Ill.2d 516, 499 N.E.2d 422 (1986).

[People v. Carter](#), 208 Ill.2d 309, 802 N.E.2d 1185 (2003) The State forfeited its argument that the evidence was insufficient to support an involuntary manslaughter instruction where the State failed to respond in the appellate court to defendant's argument that the evidence justified the instruction, and failed to raise the issue in its petition for leave to appeal or at any point until its opening brief in the Supreme Court.

[\*\*People v. Whitfield\*\*, 228 Ill.2d 502, 888 N.E.2d 1166 \(2007\)](#) The Court refused to reach the State's forfeiture argument because it failed to raise it in its petition for leave to appeal.

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**Cumulative Digest Case Summaries §56-1(b)(9)(a)**

[\*\*People v. Ramirez\*\*, 2015 IL App \(1st\) 130022](#) (No. 1-13-022, modified upon denial of rehearing 5/27/15)

Defendant argued on appeal that the trial court considered improper factors at sentencing. Defendant conceded that the issue was forfeited, but argued in a single paragraph that it should be considered under the plain-error rule “because consideration of an improper sentencing factor is plain error.” Defendant cited [\*\*People v. James\*\*, 255 Ill. App. 3d 516 \(1st Dist. 1993\)](#) for the proposition that the consideration of improper factors at sentencing is plain error.

The Appellate Court held that defendant waived his plain error argument on appeal by failing to “expressly argue, much less develop the argument that either prong of the doctrine is satisfied.” The court also noted that the holding of **James**, that every sentencing error involving the consideration of improper factors is plain error, would swallow the rule of forfeiture. The Court thus declined to conduct a plain error analysis and affirmed defendant’s sentence.

(Defendant was represented by Assistant Defender Allison Shah, Chicago.)

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**§56-1(b)(9)(b)**

**Issue Not Forfeited**

[\*\*People v. McCarty\*\*, 223 Ill.2d 109, 858 N.E.2d 15 \(2006\)](#) Issue concerning whether statute imposing a sentence of 15 to 60 years for manufacture of more than 900 grams of any substance containing methamphetamine includes byproducts of the manufacturing process in the weight calculation, as well as challenges based on due process and the proportionate penalties clause, were not forfeited although one of the two defendants did not file a post-trial motion or raise the issues in the petition for leave to appeal. A challenge to the constitutionality of a statute may be raised at any time. Furthermore, the question concerning legislative intent could be raised for the first time in the Supreme Court because it was directly related to the constitutional challenges.

[\*\*People v. Roberson\*\*, 212 Ill.2d 430, 819 N.E.2d 761 \(2004\)](#) Although defendant's petition for leave to appeal did not raise the argument on which the court granted relief, the Court elected to reach an issue of sentence credit. Not only did defendant's reply brief present the argument, but a sentence which conflicts with a statute is void and may be challenged at any time. Also, the forfeiture doctrine concerns administrative convenience and does not involve Supreme Court jurisdiction. “[C]oncerns of administrative convenience must be set aside in order to address the proper statutory provisions and to provide the most complete and accurate guidance to our public officers.”

**People v. Bailey**, 159 Ill.2d 498, 639 N.E.2d 1278 (1994) The State's argument (that a search was justified under the "search incident to arrest" doctrine) should not be deemed forfeited though it was not raised until rehearing in the appellate court. See also, **People v. Courtney**, 288 Ill.App.3d 1025, 687 N.E.2d 521 (3d Dist. 1997) (no objection to failure to appoint special prosecution).

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**Cumulative Digest Case Summaries §56-1(b)(9)(b)**

**People v. Becker**, 239 Ill.2d 215, 940 N.E.2d 1131 (2010)

1. The failure to raise an issue in a petition for leave to appeal is not a jurisdictional bar to the court's ability to review a matter. When an issue is not specifically mentioned in a party's petition for leave to appeal, but is inextricably intertwined with other matters properly before the court, review is appropriate.

Although the issue of harmless error was not mentioned in the State's petition for leave to appeal, it did argue that the appellate court erred in finding that the evidence should have been excluded. The consequence of admitted evidence is inextricably intertwined with the propriety of its admission. Therefore, the Supreme Court could address whether admission of the evidence was harmless error.

2. When deciding whether an error is harmless, a reviewing court may: (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly-admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly-admitted evidence is merely cumulative or duplicates properly-admitted evidence.

Admission of an out-of-court statement made by a child-complainant five months after the date of the offense was harmless error because it was cumulative and duplicative of properly-admitted evidence. The jury heard evidence of a statement that the child made to her mother immediately after returning from defendant's house that was more detailed than the statement asserted to be improperly admitted, as well as a videotaped interview by a detective that contained more detail than the subsequent statement. While the child expressed fear of her father that was not contained in the earlier statements, the only basis for her fear could be the conduct of defendant, which she did mention in her earlier statements.

**People v. Carey**, 2016 IL App (1st) 131944 (No. 1-13-1944, 8/22/16)

Defendant argued for the first time in a petition for rehearing that the indictment for first degree felony murder was deficient because it failed to specify which of Illinois' two mutually exclusive types of armed robbery (firearm or dangerous weapon) formed the underlying predicate offense.

Generally, issues may not be raised for the first time in a petition for rehearing. The court nonetheless addressed defendant's argument since the failure to charge an offense is a defect that may be attacked at any time.

(Defendant was represented by Assistant Defender Manny Serritos, Chicago.)

**People v. Cowart**, 2015 IL App (1st) 131073 (No. 1-13-1073, 2/17/15)

1. Defendant filed a post-conviction petition attacking his guilty plea by arguing that the trial court failed to properly admonish him that he would have to register as a sex offender. The State argued that defendant forfeited this issue by failing to raise it on direct

appeal.

The Appellate Court rejected the State's argument. Post-conviction claims that could have been raised on direct appeal are forfeited, but the failure to file any appeal at all does not forfeit such issues. For purposes of post-conviction forfeiture, a summary remand on direct appeal for non-compliance with Rule 604(d) is treated as if defendant filed no appeal at all. Here, on direct appeal, defendant's case was remanded for compliance with Rule 604(d) and thus his direct appeal was the equivalent of filing no appeal at all. Defendant therefore did not forfeit his post-conviction claim.

2. The court also rejected the State's argument that defendant's second-stage post-conviction petition was properly dismissed because he provided no affidavits or other support for his claims. The State forfeits a non-jurisdictional procedural challenge to a post-conviction petition by failing to raise that challenge in its motion to dismiss.

Here the State made no argument in its motion to dismiss about the lack of affidavits or other support for defendant's claim. The court noted that had the State raised this issue in the circuit court, defendant could have supplied the affidavits. By failing to raise this issue, the State forfeited its argument on appeal.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

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### **§56-1(b)(10)**

#### **Other Considerations**

### **§56-1(b)(10)(a)**

#### **Issue Forfeited**

**People v. Cloutier**, 178 Ill.2d 141, 687 N.E.2d 930 (1997) Defendant's obligation to object to allegedly improper comments by the prosecutor was not excused on the ground that by overruling objections to unrelated remarks, the trial court had exhibited a "disinclination" to limit the closing arguments.

**People v. Kuntu**, 188 Ill.2d 157, 720 N.E.2d 1047 (1999) Post-conviction petitioner was entitled to an evidentiary hearing to determine whether he was denied a fair trial by a personal relationship between the State's Attorney and the jury foreman, despite defense counsel's failure to request an evidentiary hearing in the trial court, because this case was "an appropriate circumstance in which to relax the waiver rule and consider the issue on its merits." Also, the State failed to argue that defendant had forfeited his right to request an evidentiary hearing.

**People v. Patrick**, 233 Ill.2d 62, 908 N.E.2d 1 (2009) By choosing not to testify, defendant Phillips forfeited review of trial court's refusal to rule, until after defendant testified, on defendant's motion in limine on the admissibility of his prior convictions.

**People v. Washington**, 182 Ill.App.3d 168, 537 N.E.2d 1354 (1st Dist. 1989) Defendant's failure to seek a continuance constituted a forfeiture of an alleged discovery error.

**People v. Leamons**, 127 Ill.App.3d 1056, 469 N.E.2d 1137 (4th Dist. 1984) Claim that trial

court erred by prohibiting cross-examination about prior false claims of sexual assault was forfeited; defendant made no offer of proof as to the manner of proving the alleged false claims. But see, [People v. Morey](#), 308 Ill.App.3d 722, 721 N.E.2d 200 (2d Dist. 1999).

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**Cumulative Digest Case Summaries §56-1(b)(10)(a)**

**[People v. Shenault](#), 2014 IL App (2d) 130211 (No. 2-13-0211, 12/23/14)**

Ordinarily, an offer of proof is necessary to preserve a claim of error arising from the exclusion of evidence. An offer of proof informs the trial judge and opposing counsel of the nature of the offered evidence and provides the reviewing court with a record on which it can determine whether exclusion of the evidence was erroneous and prejudicial.

The court found that the failure to make an offer of proof cannot be evaluated under the plain error rule. The first step in applying the plain error doctrine is determining whether reversible error occurred. Where the issue is whether evidence was improperly excluded, the failure to make a proper offer of proof prevents the court from making such a determination.

(Defendant was represented by Assistant Defender Richard Harris, Elgin.)

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**§56-1(b)(10)(b)**

**Issue Not Forfeited**

**[People v. Toolles](#)**, 177 Ill.2d 462, 687 N.E.2d 48 (1997) The court reached a non-preserved issue (validity of oral jury waiver) due to the frequency with which it arises.

**[People v. Love](#)**, 177 Ill.2d 550, 687 N.E.2d 32 (1997) Because the trial court "wholly ignored the statutory procedures mandated for a reimbursement order" and ordered reimbursement sua sponte without any warning to defendant and as if "the imposition of a reimbursement order was a perfunctory exercise," "fairness dictates that waiver should not be applied."

**[People v. Johnson](#)**, 191 Ill.2d 257, 730 N.E.2d 1107 (2000) Post-conviction petitioner did not forfeit an issue concerning the trial court's erroneous assignment of the burden of proof on fitness, though defendant failed to raise the issue in the trial court, because both parties before the court, as well as the trial judge, all proceeded under an erroneous view of the law.

**[People v. Brown](#)**, 169 Ill.2d 132, 661 N.E.2d 287 (1996) Defense preserved issue concerning voluntariness of statements by filing a motion to suppress in companion case on which litigation proceeded simultaneously. See also, **[People v. Abadia](#)**, 328 Ill.App.3d 669, 767 N.E.2d 341 (1st Dist. 2001) (the court reached closing argument issues on behalf of co-defendants although objections were raised at trial only by counsel for one defendant).

**[People v. Hope](#)**, 184 Ill.2d 39, 702 N.E.2d 1282 (1998) Trial counsel did not forfeit an issue by mistakenly citing an inapplicable precedent as the only support for his argument.

**[People v. Coleman](#)**, 227 Ill.2d 426, 882 N.E.2d 1025 (2008) Defendant did not forfeit argument urging the court to overrule precedent allowing the admission certain electronic surveillance evidence. That defendant did not ask the trial court to ignore appellate court

precedent is "unsurprising" because appellate court cases are binding in the circuit court. Also, defendant did argue at both trial and in the post-trial motion that the recordings should be suppressed, which was sufficient to preserve the issue.

**People v. Fulkerson**, 326 Ill.App.3d 1124, 762 N.E.2d 1199 (4th Dist. 2002) Defendant did not forfeit his right to the return of his bail bond deposit by failing to request a stay of disbursement before the clerk made an unauthorized transfer of the deposit to the victims. "It is unclear how or why [defendant] could be required to seek a stay of a payment which was never authorized in the first instance and of which he had no judicial notice."

**People v. Morey**, 308 Ill.App.3d 722, 721 N.E.2d 200 (2d Dist. 1999) Defendant did not forfeit his argument that the trial court erred by denying a continuance, despite counsel's failure to make an offer of proof of an informant's testimony which she expected to be able to present if the continuance was granted. Requiring a defendant to present an offer of proof concerning the testimony of a confidential informant is unrealistic and would burden defendant with an insurmountable barrier. Also, the trial judge refused to allow counsel to present an offer of proof, and instead instructed her to rest her case. And, counsel told the trial court, as best she could, what she hoped to accomplish by calling the informant.

**People v. Miller**, 311 Ill.App.3d 772, 725 N.E.2d 48 (5th Dist. 2000) Although appellant had the duty to provide a record or bystander's report sufficient to decide the issues raised on appeal, the court declined to apply the forfeiture rule though the record was insufficient, due to the magnitude of the constitutional deprivation at issue.

**People v. Lewis**, 223 Ill.2d 393, 860 N.E.2d 299 (2006) A post-trial motion which identified the issue as the improper admission of hearsay was sufficient to avoid forfeiture where the trial court clearly understood the basis for the objection and only two hearsay objections had been raised at trial.

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#### Cumulative Digest Case Summaries §56-1(b)(10)(b)

**People v. Bradley**, 406 Ill.App.3d 1030, 943 N.E.2d 759 (3d Dist. 2011)

The court rejected the State's argument that defendant forfeited his objection to the admission of an audio recording of a drug transaction due to his failure to move pretrial to suppress the recording as provided by [725 ILCS 5/108A-9](#). The State did not complete its discovery obligation to turn over documents related to and the contents of the eavesdropping recording until 12 days prior to trial. This belated disclosure excused defendant's failure to move to suppress prior to trial.

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

**People v. Rigby**, 405 Ill.App.3d 916, 940 N.E.2d 113 (1st Dist. 2010)

1. A defendant who has been assessed a DNA analysis fee need not show that he actually paid the fee before he can challenge the fee on appeal. No such prerequisite is contained in the statute.

2. A court that orders a defendant to provide a DNA sample and pay an analysis fee where a sample is already on file in the database exceeds its statutory authority. Such an order is void and not subject to forfeiture.



(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

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### §56-2

#### Plain Error

#### §56-2(a)

##### Generally

**People v. Herrett**, 137 Ill.2d 195, 561 N.E.2d 1 (1990) The plain error rule (Supreme Court Rule 615(a)) allows consideration of non-preserved errors in two circumstances: (1) where the evidence is closely balanced, and (2) where the error is so fundamental and of such magnitude that defendant was denied a fair trial. See also, **People v. Herron**, 215 Ill.2d 167, 830 N.E.2d 467 (2005); **People v. Naylor**, 229 Ill.2d 584, 893 N.E.2d 653 (2008); **People v. Walker**, 232 Ill.2d 113, 902 N.E.2d 691 (2009); **People v. Young**, 128 Ill.2d 1, 538 N.E.2d 461 (1989); **People v. Richmond**, 201 Ill.App.3d 130, 559 N.E.2d 104 (1st Dist. 1990).

**People v. Naylor**, 229 Ill.2d 584, 893 N.E.2d 653 (2008) Under the first prong of the plain-error rule, the seriousness of the error is not a factor. Under the second prong, the closeness of the evidence is not a factor. Under both prongs, the burden of persuasion remains with the defendant. Accord **People v. Walker**, 232 Ill.2d 113, 902 N.E.2d 691 (2009) (if defendant fails to carry that burden, the procedural default must be honored).

Here, although counsel waived a **Montgomery** issue by failing to include it in the post-trial motion, the court elected to reach issue as plain error.

**People v. Herron**, 215 Ill.2d 167, 830 N.E.2d 467 (2005) 1. Supreme Court Rule 451(c), which provides that in the interests of justice "substantial defects" in criminal jury instructions are not forfeited by the failure to make timely objections, and Supreme Court Rule 615(a), which provides that plain errors or defects affecting substantial rights may be noticed "although they were not brought to the attention of the trial court," both constitute plain error rules and are to be construed identically.

2. As to the first prong of the plain error rule, defendant must prove "prejudicial error," i.e., defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. See also, **People v. Crespo**, 203 Ill.2d 335, 788 N.E.2d 1117 (2003). As to the second prong of the plain error rule, defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. Prejudice to defendant is presumed because of the importance of the right involved.

3. Here, plain error occurred where the trial judge included the term "or" between factors listed in IPI Crim. 4th No. 3.15.

**People v. Hudson**, 228 Ill.2d 181, 886 N.E.2d 964 (2008) In addressing a plain error argument, the reviewing court first considers whether error occurred at all. Here, no substantive error occurred in admitting evidence of psychological harm or in instructing the jury that under the home invasion statute psychological harm could constitute "any injury."

**People v. Pickett**, 54 Ill.2d 280, 296 N.E.2d 856 (1972) The plain error rule does not mandate that a reviewing court consider all errors involving substantial rights whether or not the same have been brought to the attention of the trial court. Instead, the rule is a means of meliorating the harshness of strictly applying the general forfeiture rule. Thus, as a matter of grace the reviewing court may take notice of errors that deprived the accused of substantial means of enjoying a fair and impartial trial, even if the issue was not preserved. Likewise, in criminal cases in which the evidence is closely balanced a reviewing court may consider errors that were not properly preserved.

**People v. Keene**, 169 Ill.2d 1, 660 N.E.2d 901 (1995) Though the disjunctive approach to the plain error rule (procedural default may be excused either because the error affected "substantial rights" or because the evidence was "closely balanced") has been the subject of much criticism, "absent a foundation for assessing directly the merits and shortcomings of the disjunctive approach," that approach must be followed in Illinois cases.

**People v. Mullen**, 141 Ill.2d 394, 566 N.E.2d 222 (1990) Where the evidence is closely balanced, the main purpose of the plain error rule is to protect an innocent person from conviction. In such instances, "the probability that a defendant's conviction was caused by even a minor trial error is greatly enhanced." See also, **People v. Burns**, 144 Ill.App.3d 345, 494 N.E.2d 872 (4th Dist. 1986) (a significant purpose of the plain error rule is to correct any injustices done to a defendant; thus, the strength or weakness of the evidence is relevant, because if the evidence is close there is a possibility that an innocent person may have been convicted due to some error).

**People v. Nitz**, 219 Ill.2d 400, 848 N.E.2d 982 (2006) The plain error rule applies to **Apprendi** violations. The **Apprendi** violation was not plain error.

**People v. Davis**, 156 Ill.2d 149, 619 N.E.2d 750 (1993) The Court reiterated prior holdings that the plain error doctrine cannot be applied to procedurally defaulted errors first raised in post-conviction proceedings.

**People v. Williams**, 193 Ill.2d 306, 739 N.E.2d 455 (2000) A plain error argument is not forfeited on appeal because it was raised for the first time in the reply brief. The State is required to raise the forfeiture argument in the appellee's brief; otherwise, the State's forfeiture argument would itself be forfeited. "Accordingly, we believe it would be unfair to require a defendant to assert plain error in his or her opening brief." See also, **People v. Laugharn**, 297 Ill.App.3d 807, 698 N.E.2d 219 (4th Dist. 1998) (defendant did not forfeit plain error argument that was raised for first time in reply brief).

**People v. Williams**, 165 Ill.2d 51, 649 N.E.2d 397 (1995) The appellate court erred by reaching issues as plain error where the evidence was not closely balanced and defendant was not deprived of a fundamentally fair trial.

**People v. Johnson**, 379 Ill.App.3d 710, 885 N.E.2d 358 (2d Dist. 2008) The court declined to consider, as plain error, the State's argument that the suspicionless stop of a driver known to possess a restricted driving permit is proper under the "special needs" doctrine. Although a reviewing court may consider pure issues of law that the State may have forfeited, the plain error rule requires that the error be clear and obvious. Because application of the "special

needs" doctrine depends on "subtle balancing tests" and implicates both the individual rights of citizens and important State interests, and because there is no controlling authority on this question, any error was not clear and obvious. The court affirmed the trial court's order quashing defendant's arrest and suppressing evidence.

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**Cumulative Digest Case Summaries §56-2(a)**

**In re Danielle J., 2013 IL 110810 (No. 110810, 12/19/13)**

Under [705 ILCS 405/5-615\(l\)](#) and [In Veronica C., 239 IL 2d 134, 940 N.E.2d 1 \(2010\)](#), a minor may request a continuance under supervision in a juvenile case before an adjudication of delinquency is made, provided that the minor stipulates to facts supporting the petition and there is no objection by the minor, a parent, a guardian, or the prosecutor. Here, the minor rejected the State's pretrial offer of a continuance under supervision, but requested such a continuance after she was adjudicated delinquent.

The trial court indicated that had the State's Attorney not objected, it would have granted a continuance under supervision. The trial court then found that the provision of the statute requiring the State's Attorney's consent to a continuance under supervision was unconstitutional. The State appealed.

1. The Illinois Supreme Court found that the minor lacked standing to challenge the constitutionality of the requirement that the State's Attorney consent to a continuance under supervision.

2. However, the court concluded that defense counsel was ineffective for failing to request a continuance under supervision when it could have been granted. In addition, the trial court committed plain error where it believed that a continuance under supervision was the appropriate disposition but due to its misapprehension of the statute, failed to broach the subject until a continuance was statutorily precluded.

Ordinarily, the trial court has no obligation to suggest the possibility of a continuance under supervision. Here, however, the trial court's statements demonstrated its belief that supervision was the proper disposition. Under these circumstances, the failure to suggest a continuance under supervision "at the proper time was a result of the court's misunderstanding of the plain language of the statute." This misapprehension rendered the proceedings fundamentally unfair because "absent the trial court's misunderstanding . . . , [the minor's] opportunity to obtain a continuance under supervision would not have been lost."

The court remanded the cause for a new first-phase hearing at which the minor is to be properly advised that if she proceeds to trial and is unsuccessful, a continuance of supervision will be subject to the State's Attorney's approval. The minor will then be in a position to make an informed and knowing decision whether to accept the pretrial offer of a continuance under supervision, if that offer is reinstated. If she elects to go to trial, the minor will be able to request a continuance under supervision before the adjudication is announced.

**People v. Belknap, 2014 IL 117094 (No. 117094, 12/18/14)**

1. At the time of trial, Supreme Court Rule 431(b) required the trial court to ask each potential juror whether he or she understood and accepted several principles, including: (1) the presumption of innocence, (2) the reasonable doubt standard; (3) that the defendant is not required to offer evidence; and (4) that the defendant's failure to testify could not be held against him. The Supreme Court reiterated that the trial judge is required to ask not only whether the prospective juror accepts such principles but also whether he or she understands

them. The court accepted the State's concession that the trial judge erred by asking prospective jurors only whether they accepted the Rule 431(b) principles and not also whether they understood them.

2. The trial court's failure to comply with Supreme Court Rule 431(b) can constitute plain error only under the first prong of the plain error test, for clear or obvious error where the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant. [People v. Thompson, 238 Ill. 2d 598, 939 N.E.2d 403 \(2010\)](#). When reviewing a forfeited claim under the first prong of the plain error doctrine, the reviewing court must undertake a commonsense analysis of all of the evidence in context.

After examining the evidence, the Supreme Court rejected the Appellate Court's holding that the evidence was closely balanced. Although there were no eyewitnesses to the crime, other evidence pointed to the defendant as the perpetrator and excluded any reasonable possibility that someone else inflicted the injuries on the decedent. In addition, the testimony of two jailhouse informants concerning defendant's statements was consistent although the informants were not in the jail at the same time and there was no evidence that they had communicated with each other about defendant. The court concluded that viewing the evidence in a common sense manner under the totality of circumstances, the evidence was not closely balanced. Defendant's conviction for first degree murder was affirmed.

3. In a concurring opinion, Justice Burke found that **Thompson** was wrongly decided. Justice Burke would have held that Rule 431(b) errors should be considered under the fundamental fairness prong of the plain error rule and not under the closely balanced evidence prong. Thus, plain error occurs where the unasked question creates a likelihood of bias that would prevent the jury from returning a verdict according to the facts and the law.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

#### [People v. Clark, 2016 IL 118845 \(No. 118845, 3/24/16\)](#)

1. A defendant may not be convicted of an uncharged offense, unless it is a lesser-included offense of the charged offense and the trial evidence rationally supports conviction on the lesser offense and acquittal on the greater offense. Courts use the charging instrument approach in determining whether an uncharged offense is a lesser-included offense.

2. The State charged defendant with aggravated vehicular hijacking while armed with a firearm ([720 ILCS 5/18-4\(a\)\(4\)](#)) and armed robbery while armed with a firearm ([720 ILCS 5/18-2\(a\)\(2\)](#)). Following a bench trial, the court acknowledged that defendant committed the offenses while armed with a gun, but determined that the gun was used as a bludgeon "and will be treated as such." The court thus found defendant guilty of aggravated vehicular hijacking and armed robbery without a firearm. Defendant did not object to this finding.

3. Both the aggravated vehicular hijacking and armed robbery statutes make a clear distinction between committing these offenses while being armed with either (1) a firearm or (2) a dangerous weapon other than a firearm. [720 ILCS 5/18-2\(a\)\(1\), \(2\)](#); [720 ILCS 5/18-4\(a\)\(3\), \(4\)](#).

The Illinois Supreme Court held that it "would have to stretch plain meaning and common understanding beyond a semblance of reason" to find that charging defendant with committing these offenses while armed with a firearm gave him notice that he was also charged with committing these offenses while armed with a dangerous weapon other than a firearm. The plain language of these statutes shows that the different offenses are mutually exclusive of each other. The offenses of aggravated vehicular hijacking and armed robbery without a firearm are not lesser-included offenses of the charged offenses.

4. Although defendant did not object to this error, the Supreme Court found that it was

cognizable and remedial under the second prong of plain error. Plain error is applicable when clear or obvious error occurs and: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

The court first held that the error here was clear since the two offenses as defined in the relevant statutes are mutually exclusive of each other. The court also found that the error challenged the integrity of the judicial process. Although the trial court may have attempted to afford defendant some benefit by convicting him of using a weapon other than a firearm (when all of the evidence showed that he did in fact possess a firearm), the result of the trial court's actions was that defendant was convicted of offenses that he was not charged with and did not commit. Permitting unauthorized convictions to stand challenges the integrity of the judicial process.

In reaching this decision, the court specifically declined to limit the second prong of plain error to the six types of structural error recognized by the United States Supreme Court.

The court affirmed the lower court's judgment reducing defendant's convictions to vehicular hijacking and robbery and remanding the case for resentencing.

(Defendant was represented by Assistant Defender Gil Lenz, Chicago.)

#### **People v. Eppinger, 2013 IL 114121 (No. 114121, 2/22/13)**

The plain error rule applies in either of two circumstances: (1) when a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) when a clear or obvious error occurred and that error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. Concerning the second prong, the defendant must demonstrate not only that a clear or obvious error occurred, but also that the error was structural.

(Defendant was represented by Assistant Defender Fletcher Hamill, Elgin.)

#### **People v. Hillier, 237 Ill.2d 539, 931 N.E.2d 1184 (2010)**

1. The plain error rule is a narrow exception to the forfeiture doctrine, and requires a defendant to show either that the evidence is closely balanced or the error is so egregious as to deny a fair proceeding. Under either test, the defendant has the burden of persuasion.

Where the State asserts that the defendant has forfeited review of an issue, the reviewing court must first determine whether forfeiture occurred. If so, the court must hold the defendant to his burden of demonstrating plain error. Here, the Appellate Court erred by neglecting to deal with the merits of the forfeiture claim, and instead writing an opinion dealing with the merits of issues raised for the first time on appeal.

2. A defendant who fails to make any argument for plain error in the reviewing court "obviously cannot meet his burden of persuasion," and therefore forfeits plain error review. Here, defendant forfeited any plain error argument where his only response to the State's forfeiture argument was to argue that the State was guilty of forfeiture by failing to raise its argument in the Appellate Court.

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

#### **People v. Johnson, 238 Ill.2d 478, 939 N.E.2d 475 (2010)**

1. Ordinarily, appellate review is waived unless the defendant both objected to an error at trial and raised the issue in the post-trial motion. The plain error rule allows a reviewing



court to consider a forfeited claim when the evidence was so closely balanced that the error threatened to tip the scales of justice against the defendant, or where the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. Under the second test, the strength of the evidence is immaterial.

2. The second prong of the plain error rule was not satisfied where defendant failed to object when the trial court responded to a jury question without notifying the parties. Although criminal defendants have a general right to be present at every stage of the trial, the right to be present is not itself a substantial right under the Illinois or federal constitutions. Instead, it is a lesser right intended to secure substantial rights such as the right to confrontation, the right to present a defense, or the right to an impartial jury. Because the defendant failed to show that any of these underlying rights had been violated, responding to the note in the absence of defendant or his counsel was not such a serious error as to affect the fairness of the trial or the integrity of the judicial process.

The court acknowledged that historically, it granted a new trial whenever *ex parte* communication occurred between the trial judge and the jury. In recent years, however, it has moved away from that rule and requires a new trial only if the defendant suffered prejudice. Because the court's response to continue deliberations was well within the court's discretion and was not coercive, no prejudice occurred.

3. The court rejected defendant's argument that the failure to object to the *ex parte* communication was protected by [People v. Sprinkle, 27 Ill.2d 398, 189 N.E.2d 295 \(1963\)](#). In [Sprinkle](#), the Supreme Court held that the failure to object may be excused where the trial court overstepped its authority in the presence of the jury or would have been unwilling to consider an objection.

The trial court did not overstep its authority by instructing the jury to continue deliberating. Furthermore, nothing in the record suggests that the trial court would have ignored an objection raised after the jury was dismissed, when defendant first became aware of the note. Under these circumstances, **Sprinkle** does not justify relaxing the forfeiture rule.

Defendant's conviction for criminal sexual abuse was affirmed.

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

### [People v. Lewis, 234 Ill.2d 32, 912 N.E.2d 1220 \(2009\)](#)

1. [730 ILCS 5/5-9-1.1\(a\)](#) provides that a person convicted of certain drug offenses "shall" be assessed a fine that is "not less than the full street value" of the substance seized. (See **NARCOTICS**, §34-4). Although defendant failed to object in the trial court, the Supreme Court concluded that imposition of a street value fine without a sufficient evidentiary basis satisfies the "fundamental fairness" prong of the plain error rule. The court rejected the Appellate Court's finding that a \$100 fine is too insignificant to constitute plain error, finding that a *de minimus* exception to the plain error rule "would be difficult to implement because of the difficulty in determining when an error is significant," and would be inconsistent with "the fundamental fairness concerns of the plain error doctrine."

The court vacated the \$100 street value fine and remanded the cause for the trial court to impose a new fine based on evidence of the value of the substance seized from the defendant.

2. The court also held that the notice of appeal was sufficient to justify appellate review. (See **APPEAL**, §2-2(a)).

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

### [People v. Thompson, 238 Ill.2d 598, 939 N.E.2d 403 \(2010\)](#)



Supreme Court Rule 431(b) requires the trial court to ask each potential juror whether he or she understands and accepts the presumption of innocence, the reasonable doubt standard, that the defendant need not present any evidence, and that the defendant's failure to testify cannot be held against him. The court found that defendant forfeited the issue by failing to raise it in the trial court, and that the forfeiture was not excused.

1. A violation of Rule 431(b) does not constitute "structural" error which requires reversal in every case. An error is structural only if it necessarily makes the trial fundamentally unfair or unreliable as a means of determining guilt or innocence. Only a limited number of errors are considered structural; examples include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction.

The court noted that in [People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 \(2009\)](#), it held that the failure to comply with an earlier version of Rule 431(b) was not structural error. The court concluded that the same reasoning applies to the amended version of the rule.

Although structural error would occur if a defendant was forced to stand trial before a biased jury, Rule 431(b) is but one method of insuring a fair jury. Thus, the failure to comply with Rule 431(b) does not necessarily result in a biased jury and unfair trial. Because the error does not in and of itself render the trial unreliable, the error is not structural.

2. Similarly, the forfeiture could not be excused under the "fundamental error" prong of the plain error rule. To satisfy this test, a clear or obvious error must have been so serious as to affect the fairness of the trial and challenge the integrity of the judicial process.

Because compliance with Rule 431(b) is not indispensable to a fair trial, the mere failure to comply with Rule 431(b) does not necessarily affect the fairness of the trial or challenge the integrity of the process. Thus, the plain error rule does not apply.

3. The court rejected the argument that defendant was excused from objecting to the noncompliance with Rule 431(b) under the **Sprinkle** doctrine, which relaxes the forfeiture rule where the trial court oversteps its authority in the presence of the jury or would not have been willing to consider an objection. There was no reason to believe that the trial court would have ignored an objection or would have refused to follow Rule 431(b) had the issue been raised.

4. Finally, the court rejected the argument that a "bright line" rule requiring reversal is necessary to force trial courts to comply with Rule 431(b). The court stressed that most cases in which trial courts failed to follow Rule 431(b) arose immediately after the rule was amended, and there is no reason to believe that trial judges are reluctant to follow the rule.

Defendant's conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Elena Penick, Chicago.)

### **People v. White**, 2011 IL 109689 (No. 109689, 8/4/11)

The court acknowledged that it typically undertakes plain-error review by first determining whether error occurred at all, but it declined to do so in this case.

Consistent with the principle of judicial restraint, courts of review should not consider issues that are not essential to the disposition of the case or where the result will not be affected regardless of how the issues are decided. Courts consider constitutional issues only where essential to the disposition of a case. Therefore, where the only basis for a claim of plain error is that the evidence is closely balanced, and it is clear that the alleged error would not have affected the outcome of the case, a court of review should not engage in the meaningless endeavor of determining whether error occurred.

The evidence in defendant's case was not closely balanced. Four unrelated individuals

initially identified defendant as the offender. The lineup that was the subject of the alleged error did not figure prominently in the court's finding of guilt. Photo identifications that preceded the lineup would not be implicated by the alleged constitutional error. The in-court identifications by the witnesses had a basis independent of the lineup. The circumstances surrounding the conduct of the lineup and the events leading up to it were not developed in the record. Therefore, the court declined to decide as a matter of plain error whether defendant's Sixth Amendment right to counsel had attached at the lineup and whether that right to counsel was violated when counsel was excluded from the room where the witnesses viewed the lineup.

**[People v. Belknap, 2013 IL App \(3d\) 110833 \(No. 3-11-0833, 11/19/13\)](#)**

The determination of whether the evidence is closely balanced for purposes of the plain error rule is a different determination than whether the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. A finding that the evidence was sufficient to prove defendant guilty does not preclude a determination that the evidence was closely balanced. There is no *de minimus* exception to this prong of the plain error rule, and defendant is not required to show any additional prejudice to be entitled to relief. Unpreserved error is considered when the evidence is closely balanced, regardless of the seriousness of the error.

The evidence against defendant was closely balanced. No eyewitnesses saw defendant commit the offense. No physical evidence directly linked defendant to the offense. The strongest evidence that the State presented was the testimony of two jailhouse informants regarding defendant's alleged confession to them. While such testimony may ultimately be found credible, it must be treated with caution. The remaining circumstantial evidence could be viewed as either indicative of defendant's guilt or explained innocently away depending on the view of the evidence taken by the jury.

Under the closely-balanced prong of the plain error rule, the Appellate Court reversed and remanded for a new trial because the trial court failed to determine that the prospective jurors both understood and accepted the four Rule 431(b) principles.

Wright, J., dissented. More recent guidance from the Illinois Supreme Court in [People v. White, 2011 IL 109689](#), and [People v. Adams, 2012 IL 111168](#), compels a different conclusion regarding whether the evidence of guilt is closely balanced. In evaluating whether the evidence is closely balanced, a court should conduct a qualitative, rather than quantitative, commonsense assessment of the totality of the evidence presented.

It was undisputed the cause of death was multiple blunt force trauma occurring 12 to 24 hours of the child's arrival in the emergency room. Only three persons, the child's mother, the child's uncle, and defendant, were among the potential perpetrators. The defense theory excluded the mother and the uncle as the perpetrators and suggested the injuries may have been caused by the child playing on a trampoline. However, that theory was not supported by any evidence and was inconsistent with the number and location of the child's injuries. It is entirely possible that the jurors rejected the testimony of the jailhouse informants and circumstantially inferred that defendant could only be certain of the innocence of the mother and uncle due to his knowledge of his role in the child's death.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

**[People v. Booker, 2015 IL App \(1st\) 131872 \(No. 1-13-1872, 5/12/15\)](#)**

As a matter of plain error under the second-prong of the plain error rule, the court found that a defendant who was charged with home invasion while armed with a firearm could not be convicted of home invasion while armed with a dangerous weapon other than a firearm.

Second-prong plain error applies where an unpreserved error violates due process and implicates the integrity of the judicial process.

The court rejected the argument that in Illinois, second-prong plain error is equivalent to “structural error” under the federal constitution and is recognized only where there is a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of the grand jury, denial of the right to self-representation at trial, denial of a public trial, or defective reasonable doubt instructions. The court noted that Illinois case law does not restrict plain error to the six types of structural error listed above, and that the Illinois Supreme Court has found second-prong plain error concerning other issues.

**People v. Campbell, 2015 IL App (3d) 130614 (No. 3-13-0614, 8/6/15)**

The failure to properly admonish defendant about his right to a jury trial affected his fundamental right to a jury and thus was reviewable under the second prong of plain error. (Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

**People v. Carbajal, 2013 IL App (2d) 111018 (No. 2-11-1018, 3/7/13)**

The plain-error doctrine contained in Supreme Court Rule 615(a) provides a narrow exception to the general rule of procedural default. A reviewing court may consider an unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. The defendant bears the burden of persuasion.

The evidence against defendant in a burglary prosecution was closely balanced. The case boiled down to the issue of defendant’s intent at the moment he entered the building. Defendant contended he had no intent to commit a theft and that his companion did not discuss committing a theft until after they entered the building. While defendant fled when the police arrived, this evidence of his consciousness of guilt could have led the jury to find him guilty of criminal trespass rather than burglary. Defendant’s written statement could support the inference that he was aware of his companion’s plan to commit a theft, but the statement did not indicate *when* the companion revealed his plan.

The conduct of the prosecutor in misstating the law of accountability and shifting the burden of proof to the defendant threatened to tip the scales of justice against the defendant. Even though, in response to the defense objection, the court admonished the jury that it would instruct the jury as to the law, the prejudicial effect of an improper argument cannot always be erased from the minds of the jurors by an admonition by the court. Therefore, the prosecutor’s improper comments were noticed as plain error.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

**People v. Clark, 2014 IL App (1st) 123494 (No. 1-12-3494, 11/20/14)**

The court concluded that convicting a defendant on charges which were not lesser-included offenses of charged crimes constitutes plain error under the second prong of the plain error rule, which applies to clear and obvious errors which are so serious as to affect the reliability of the trial and challenge the integrity of the judicial process. The court rejected the State’s argument that the second prong of the plain error rule applies only to a limited class of errors identified as “structural error” by the United States Supreme Court, including the complete denial of counsel, trial before a biased judge, racial discrimination in the selection

of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. The court concluded that the Illinois Supreme Court did not intend to so limit second prong plain error.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

**People v. Dunlap, 2013 IL App (4th) 110892 (No. 4-11-0892, 7/1/13)**

The plain error rule applies only to issues which were procedurally defaulted, and not to issues which were affirmatively waived.

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

**People v. Faria, 402 Ill.App.3d 475, 931 N.E.2d 742 (1st Dist. 2010)**

1. Although the forfeiture rule may be relaxed where an unpreserved issue concerns actions taken by the trial court, forfeiture should be ignored only in the most compelling situations, such as where a judge makes inappropriate remarks to the jury or the case involves capital punishment. ([People v. McLaurin, 235 Ill.2d 478, 922 N.E.2d 344 \(2009\)](#)). Here, the forfeiture rule was not relaxed although the trial judge “took over” defense counsel’s cross-examination and interrupted counsel repeatedly.

First, because defendant was convicted in a bench trial, there was no jury to be influenced. However, “[h]ad this been a jury trial, we may well have reached a different decision.”

Furthermore, the trial judge did not act in counsel’s absence or in any way prevent objections from being made.

2. The plain error rule applies to a forfeited issue which affects the substantial rights of a defendant, if the evidence is so closely balanced that the guilty verdict might have resulted from the error or the error is so serious that the defendant was denied a substantial right and a fair trial. To determine whether plain error occurred under the latter test, the court must first determine whether a clear or obvious error occurred.

Here, no clear or obvious error occurred. Thus, the plain error rule did not apply.

**People v. Fillyaw and Parker, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011)**

Supreme Court Rule 615(a) allows consideration of a non-preserved error as plain error where the error affects a defendant’s substantial rights.

The admission of a nontestifying co-defendant’s statement implicating Parker in the commission of the offense was plain error. Because the error implicated Parker’s due process and confrontation clause rights, it necessarily affected his substantial rights. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor’s argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

(Defendant Fillyaw was represented by Assistant Defender Kathleen Hamill, Elgin and Defendant Parker was represented by Assistant Defender Yasaman Navai, Chicago.)

**People v. Getter, 2015 IL App (1st) 121307 (No. 1-12-1307, 1/6/15)**

The State argued that the error in this case, the failure to instruct the jury on self-defense, did not constitute second-prong plain error since the Illinois Supreme Court has limited second-prong plain error to structural error, in particular the six examples of structural error identified by the United States Supreme Court: complete denial of counsel, trial before a biased judge, racial discrimination in grand jury selection, denial of the right to self-representation, denial of a public trial, and defective reasonable doubt instructions.

The Appellate Court rejected the State's argument, holding that while the Illinois Supreme Court has analogized second-prong plain error to structural error, it has never limited it to structural error, and has instead found second-prong plain error in situations other than the six examples cited by the State. In [People v. Sargent, 239 Ill. 2d 166 \(2010\)](#), for example, the Supreme Court found that the failure to instruct the jury on hearsay statements made by a child sex-abuse victim rises to the level of second-prong plain error since it creates a serious risk that the jurors did not understand the applicable law, which would seriously threaten the fairness of trial. This test would be unnecessary if the only question was whether the error fit within one of the six categories of structural error.

The Appellate Court found that the failure to instruct the jury on self-defense constituted second-prong plain error. It reversed defendant's conviction and remanded for a new trial.

Defendant was represented by Assistant Defender David Berger, Chicago.)

**[People v. Hagler, 402 Ill.App.3d 149, 937 N.E.2d 204 \(2d Dist. 2010\)](#)**

An error must be preserved by both an objection at trial and inclusion in a post-trial motion to avoid forfeiture. An exception exists under the second prong of the plain-error rule if the error is so serious that it affects the fairness of the trial and challenges the integrity of the judicial process.

The court held that defendant's one-act, one-crime argument was properly reviewed as plain error because violations of the one-act, one-crime rule implicate the integrity of the judicial process.

(Defendant was represented by Assistant Defender John Hildebrand, Elgin.)

**[People v. Jackson, 409 Ill.App.3d 631, 949 N.E.2d 215 \(1st Dist. 2011\)](#)**

The plain error doctrine allows a court to review a forfeited claim of error that affects a substantial right in two instances: where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. Under the second prong of a plain error analysis, prejudice is presumed, but the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

Where the judge abandons his role as a neutral and impartial arbiter of fact, defendant's claim is reviewed under the second prong of the plain error doctrine because the trial court's conduct pertains to defendant's right to a fair trial. When a judge displays signs of bias against a defendant, the system ceases to function as it properly should, resulting in plain error and requiring reversal.

The trial judge abandoned his role as a neutral and impartial arbiter of fact in a bench trial when he adopted a prosecutorial role in questioning defendant's expert witness and relied on matters of prior private knowledge in rejecting defendant's insanity defense. Although not preserved for review, these errors were noticed under the second prong of the plain error analysis, requiring reversal of defendant's conviction.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

**[People v. Johnson, 2015 IL App \(1st\) 141216 \(No. 1-14-1216, 12/23/15\)](#)**

Entry of a conviction on a crime which is not a lesser-included offense constitutes second-prong plain error in that the fundamental right to notice of the charges is violated and the fairness of the trial and integrity of the judicial process are affected. The court rejected the



argument that second-stage plain error is limited to the six “structural” errors identified by the U.S. Supreme Court, including: (1) complete denial of counsel; (2) biased trial judge; (3) racial discrimination in selection of grand jury; (4) denial of self-representation at trial; (5) denial of public trial; and (6) defective reasonable-doubt instruction. The court noted that the Illinois Supreme Court has not limited second-stage plain error to these six areas and has held that an error may be reversible even if it “was not within the class of ‘structural’ errors recognized by the [U.S.] Supreme Court.”

(Defendant was represented by Assistant Defender Maria Harrigan, Chicago.)

**People v. Maldonado**, 398 Ill.App.3d 401, 922 N.E.2d 1211 (1st Dist. 2010)

1. An issue is preserved for appeal by: (1) objecting at trial or raising the issue in a motion *in limine*, and (2) presenting the issue in a post-trial motion. The defendant preserved an issue concerning the admissibility of gang-related testimony where the State filed a motion *in limine* to admit the evidence for a limited purposes, defendant replied by objecting to the admission of gang evidence for any purpose, and the issue was raised in the post-trial motion.

2. Even had the defendant not preserved the issue, it would be reviewable as plain error because the evidence was closely balanced and the improper admission of gang related evidence could have affected the outcome of the case. (See **EVIDENCE**, §§19-2(b)(1), 19-5, 19-16).

(Defendant was represented by Assistant Defender Jessica Hunter, Chicago.)

**People v. Martin**, 408 Ill.App.3d 891, 946 N.E.2d 990 (2d Dist. 2011)

To preserve an issue for review, the defendant is required to both offer a specific objection at trial and raise the matter in the post-trial motion. An appellant who fails to ask the reviewing court to apply the plain error rule forfeits any argument concerning plain error.

Although a post-trial motion attacking the sufficiency of the evidence is not required to preserve a reasonable doubt issue, a claim that an out-of-court statement was improperly admitted cannot be recast as a reasonable doubt argument in order to avoid forfeiture.

(Defendant was represented by Panel Attorney Thomas Brandstrader, Chicago.)

**People v. Miller**, 2013 IL App (1st) 110879 (No. 1-11-0879, 6/28/13)

The court concluded that reversal of a conviction for aggravated possession of a stolen motor vehicle was required by the cumulative effect of two plain errors committed by the trial judge: (1) incorrectly remembering testimony when making credibility determinations, and (2) excluding evidence concerning the owner’s belief that the car had been sold. Defendant was prejudiced by the cumulative effect of the errors because the evidence was closely balanced on whether the defendant was a *bona fide* purchaser, defendant rebutted the inference that he knew the vehicle was stolen by calling witnesses who testified that the vehicle had been purchased from the owner’s husband, and defendant’s explanation was reasonable and could have convinced a reasonable trier of fact.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

**People v. Oliver**, 2012 IL App (1st) 102531 (No. 1-10-2531, 5/9/12)

Where the defendant has made a timely objection and properly preserved an error for review, the reviewing court conducts a harmless-error analysis in which the State has the burden of proof. Where the defendant fails to make a timely objection and forfeits review, the reviewing court will examine the record only for plain error. In plain-error review, the burden of persuasion remains on defendant.



When a defendant who has not waived or forfeited his right to be present shows that the court conducted a critical stage of the proceedings in defendant's absence, the defendant has shown a violation of his constitutional rights. The burden is on the State to show that the error is harmless beyond a reasonable doubt. Where the defendant has not preserved the error for review, the burden is on the defendant to show that he was prejudiced by the violation of his right to be present.

Plain error did not occur due to defendant's absence from the conference on jury selection because his absence did not have the slightest effect on the impartiality of jury selection.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

**[People v. Richardson, 2013 IL App \(1st\) 111788 \(No. 1-11-1788, 11/13/13\)](#)**

Under the plain-error doctrine, the court may reverse a judgment if either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

In a prosecution for aggravated battery of a child, plain error occurred where the trial court failed to ascertain that the prospective jurors both understood and accepted the principles specified in Supreme Court Rule 431(b). The defendant did not contest that the child was injured during the period of time that she had responsibility for the child. The issue that the jury had to decide was whether the defendant acted with intent to injure the child or knowledge that her acts would injure the child.

An ER doctor testified that the injury, a spiral fracture of the tibia, resulted from child abuse. Defendant's statement only admitted to pulling the child out of his child seat "in an aggressive way," which caused the child's foot to twist as she pulled him. Defendant did not state that she intended to twist the foot or that she knew that the twisting could cause great bodily harm. The ER doctor admitted that only 3% of his practice involved children as young as the injured child and that a physician at Children's Memorial Hospital could not determine whether the injury resulted from child abuse. Defendant's failure to tell the child's mother about the injury could be explained by fear and hope that the injury would not prove to be severe, even if defendant had caused the injury accidentally. On this evidence, it was a very close question whether defendant knew, before she pulled the child out of his car seat, that by so doing she would cause him great bodily harm.

The error left open the possibility that a juror may have resolved this close question on an improper basis. Jurors may not have understood the counterintuitive principle that, even after prosecutors filed a charge, they must presume the defendant innocent, and they must not treat defendant's decision not to testify as evidence of guilt. The court reversed and remanded because the error in questioning the venire may have tipped the scales of justice against defendant in this closely-balanced case.

Mason, J., dissented.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

**[People v. Sanders, 2016 IL App \(3d\) 130511 \(No. 3-13-0511, 6/13/16\)](#)**

The court concluded that the erroneous consideration of a factor inherent in the offense constitutes second prong plain error. Although some precedent has equated second prong plain error with structural error, the Illinois Supreme Court recently held that the second prong is not limited to structural error. [People v. Clark, 2016 IL 118845](#).

The court concluded that consideration of a sentencing factor that is inherent in the offense affects the fundamental right to liberty because it impinges on the basic right not to be sentenced based on an improper factor. Therefore, where more than insignificant weight is given to an inherent factor, second prong plain error occurs.

(Defendant was represented by Assistant Defender Vicki Kouros, Ottawa.)

**People v. Taylor, 409 Ill.App.3d 881, 949 N.E.2d 124 (1st Dist. 2011)**

1. To preserve an alleged error for appellate review, the defense must both object at trial and raise the issue in the post-trial motion. Although the reviewing court may reach an unpreserved error under the plain error doctrine, the defendant forfeits the right to plain error review where he fails to request such review. Here, defendant waived plain error review of several evidentiary issues by failing to make an adequate request in the reviewing court.

2. The court also held that two of the allegations of error would have been rejected on the merits had they been reached.

(Defendant was represented by Assistant Defender Melissa Chiang, Chicago.)

**People v. Turman, \_\_\_ Ill.App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (1st Dist. 2011) (No. 1-09-1019, 6/30/11)**

The plain error doctrine allows review of unpreserved errors when: (1) a clear or obvious error, regardless of the seriousness of the error, occurred where the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the clear or obvious error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

The court found two instructional errors to be plain error:

1. The court committed plain error in instructing the jury that it could "collectively determine what reasonable doubt is." A 17-year-old defendant was charged with criminal sexual assault of 19-year-old college student who had drunk excessive amounts of alcohol, on the theory that he knew that she was unable to give knowing consent to sexual acts. Faced with this difficult task, it was critical that the jury understand what standard of proof it was to utilize. Under the first prong, because of the closeness of the evidence, the clear error threatened to tip the scales of justice against the defendant. Under the second prong, the error was so serious that it affected the fairness of the defendant's trial and his right to due process, thereby challenging the integrity of the judicial process.

2. The court also found that the omission of language that it was for the jury to determine whether the defendant made the statement from an instruction regarding the jury's consideration of statement evidence (IPI Crim. 4th No. 3.06-3.07) was plain error. At trial, defendant denied making many of the statements contained in a written statement. He testified that the statement was never reread to him even though he signed each page of the statement, and asserted that he did not even know the definition of a word attributed to him in the statement. There was evidence supporting his denial as the grammar and language used by defendant in a note he wrote to the complainant was at odds with the language the prosecution claimed defendant used in the statement. Given the importance of the statement to the State's case and the closely-balanced nature of the evidence, the error "threatened to tip the scales of justice away from the defendant." It also satisfied the second prong of the plain-error rule as it "deprived the defendant of a fair trial and impacted the integrity of the judicial process."

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

**People v. Vesey**, 2011 IL App (3d) 090570 (No. 3-09-0570, 9/27/11)

Once the defendant proves error in a closely-balanced case, the error is presumptively prejudicial. Defendant is entitled to reversal without any further showing of prejudice. **People v. Herron**, 215 Ill.2d 167, 830 N.E.2d 467 (2005). Any statement in **People v. White**, 2011 IL 109689, indicating that defendant may obtain reversal of his conviction under the closely-balanced-evidence prong of the plain-error rule only if he can show that he was prejudiced by the error, was unnecessary to the court's holding and did not overrule the plain-error analysis of **Herron**.

(Defendant was represented by Panel Attorney Ron Dolak, Geneva.)

**People v. Watt**, 2013 IL App (2d) 120183 (No. 2-12-0183, 11/21/13)

The plain-error doctrine allows a reviewing court to reach a forfeited error in two instances: where the evidence is so closely balanced that the jury's guilty verdict might have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. The second prong of the rule deals with presumptively prejudicial errors, which must be remedied although they might not have affected the outcome. A presumptively prejudicial error occurs only where the error is deemed structural. An instruction that either omits an element of the offense or misdescribes an element is not structural error.

It was error to instruct the jury that it could convict defendant of armed robbery based on a finding that he was armed with a dangerous weapon, where he was charged with committing armed robbery with a firearm. The Appellate Court declined to find plain error where the evidence was not closely balanced on the issue of guilt and the defect in the instructions was only a misdescription of an element that did not rise to the level of structural error.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

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**§56-2(b)**

**Application of Plain Error Rule**

**§56-2(b)(1)**

**Jury Instruction Error**

**§56-2(b)(1)(a)**

**Plain Error**

**People v. Reddick**, 123 Ill.2d 184, 526 N.E.2d 141 (1988) Substantial defects in jury instructions, such as "burden of proof and elements of the offense," may be considered as plain error. Here, erroneous burden of proof and elements instructions were plain error. See also, **People v. Parks**, 65 Ill.2d 132, 357 N.E.2d 487 (1976); **People v. Layhew**, 139 Ill.2d 476, 564 N.E.2d 1232 (1990) (but harmless).

**People v. Fierer**, 124 Ill.2d 176, 529 N.E.2d 972 (1988) An instruction that misstated the burden of proof for guilty but mentally ill verdict was plain error.

**People v. Jenkins**, 69 Ill.2d 61, 370 N.E.2d 532 (1977) Conflicting issues instructions constituted plain error.

**People v. Ogunsola**, 87 Ill.2d 216, 429 N.E.2d 861 (1981) The failure to correctly instruct the jury on the elements of the crime charged (deceptive practices) was plain error. See also, **People v. Turner**, 178 Ill.App.3d 510, 534 N.E.2d 179 (2d Dist. 1989) (forgery instruction that failed to include essential element (that the document in question was "apparently capable of defrauding another") was plain error); **People v. Delgado**, 376 Ill.App.3d 307, 876 N.E.2d 189 (1st Dist. 2007) (where defendant was charged with aggravated criminal sexual abuse based upon the transmission of semen to the complainant's stomach, it was "clear and obvious" error to fail to properly define "sexual conduct" as applied to the case; the evidence here was closely balanced, and because the instructional error "threatened to tip the scales of justice," defendant carried his burden to show that he was prejudiced).

**People v. Thurman**, 104 Ill.2d 326, 472 N.E.2d 414 (1984) Plain error where "lawful justification" language was omitted from issues instruction for involuntary manslaughter. See also, **People v. Berry**, 99 Ill.2d 499, 460 N.E.2d 742 (1984).

**People v. Williams**, 120 Ill.App.3d 900, 458 N.E.2d 1312 (1st Dist. 1983) Plain error occurred where the trial court failed to give IPI 2.03 (presumption of innocence and burden of proof) sua sponte.

**People v. Herron**, 215 Ill.2d 167, 830 N.E.2d 467 (2005) Plain error occurred where the trial judge included the term "or" between factors listed in IPI Crim. 4th No. 3.15. Accord, **People v. Piatkowski**, 225 Ill.2d 551, 870 N.E.2d 403 (2007) (evidence was closely balanced); **People v. Sareceno**, 341 Ill.App.3d 108, 791 N.E.2d 1239 (1st Dist. 2003).

**People v. McDaniel**, 125 Ill.App.3d 694, 466 N.E.2d 662 (4th Dist. 1984) Plain error occurred where an erroneous issues instruction for attempt murder was given. Because "defendant's mental state was at issue, . . . the incorrect instructions could have led the jury to convict the defendant of attempted murder for less than intent to kill." See also, **People v. Sanders**, 129 Ill.App.3d 552, 472 N.E.2d 1156 (1st Dist. 1984).

**People v. Velasco**, 184 Ill.App.3d 618, 540 N.E.2d 521 (1st Dist. 1989) The court considered defective attempt murder instructions, which allowed the jury to convict without finding intent to kill, to be plain error (but the error was harmless).

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### Cumulative Digest Case Summaries §56-2(b)(1)(a)

**People v. Anderson**, 2012 IL App (1st) 103288 (No. 1-10-3288, 8/24/12)

1. The sole function of instructions is to convey to the minds of the jury the correct principles of law applicable to the evidence so that the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence. Jury instructions should not be misleading or confusing, and their correctness depends on whether ordinary persons acting as jurors would fail to understand them. Defendant must show that the claimed instructional error created a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the

fairness of the trial.

2. Under Supreme Court Rule 451(c), claims of error related to substantial defects in jury instructions are not subject to forfeiture on appeal. An erroneous instruction constitutes a substantial defect, or plain error, when it creates a serious risk that the defendant was incorrectly convicted because the jury did not understand the applicable law, so as to threaten the fundamental fairness of the trial. Defendant need not prove that the error in the instruction actually misled the jury.

Plain error arises in two circumstances: (1) where the evidence is closely balanced, or (2) where the flaw in the instruction is grave or so serious that it denies the defendant a substantial right and undermines the integrity of the judicial process. Where there is error in a close case, courts err on the side of fairness, so as not to convict an innocent person.

3. Defendant was charged with first-degree murder of one person and attempt murder of another person. The attempt-murder instruction did not name the victim. It informed the jury that it could find defendant guilty of attempting to murder “an individual.”

4. The Appellate Court found that it was probable that the ordinary juror would not understand that the subject of the attempt-murder instruction was only the alleged victim of the attempt murder, rather than the murder victim. Even though the court read the indictment to the jury at the beginning of trial and the State correctly identified the subject of the attempt-murder charge for the jury in closing argument, the jury was instructed that the indictment and closing arguments were not to be considered as evidence against the defendant. Defense counsel’s argument never addressed to whom the attempt-murder instruction applied.

5. The defective instruction was plain error because the evidence on the attempt-murder charge was closely balanced. The alleged victim of the attempt murder testified that he saw defendant commit the murder and that he heard more shots fired after that shooting, but he did not know in which direction they were fired as he ran to his car and fled from the scene. There were no bullet holes in his car. Defendant’s companion made a statement that defendant shot at “another person,” but he did not identify that person as the alleged attempt-murder victim, and he recanted this statement at trial. Therefore, the defendant may have been convicted of attempt murder based on the error in the instruction rather than the evidence.

The Appellate Court reversed defendant’s conviction for attempt murder and remanded for a new trial.

Garcia, J., dissented in part on the ground that the evidence on the attempt-murder charge was so lacking that a retrial on that charge would violate defendant’s constitutional right against double jeopardy.

(Defendant was represented by Assistant Defender Alison Shah, Chicago.)

### **People v. Booker, 2015 IL App (1st) 131872 (No. 1-13-1872, 5/12/15)**

As a matter of plain error under the second-prong of the plain error rule, the court found that a defendant who was charged with home invasion while armed with a firearm could not be convicted of home invasion while armed with a dangerous weapon other than a firearm. Second-prong plain error applies where an unpreserved error violates due process and implicates the integrity of the judicial process.

The court rejected the argument that in Illinois, second-prong plain error is equivalent to “structural error” under the federal constitution and is recognized only where there is a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of the grand jury, denial of the right to self-representation at trial, denial of a public trial, or



defective reasonable doubt instructions. The court noted that Illinois case law does not restrict plain error to the six types of structural error listed above, and that the Illinois Supreme Court has found second-prong plain error concerning other issues.

**People v. Cacini, 2015 IL App (1st) 130135 (No. 1-13-0135 & 1-13-3166, 12/11/15)**

Defendant was convicted, in a jury trial, of attempt first degree murder and aggravated battery. The trial court concluded that the evidence was sufficient to warrant giving self-defense instructions, and gave [IPI Criminal 4th No. 24-25.06](#), which provides the general definition of self-defense. However, the trial judge failed to also give [IPI Criminal 4th No. 24-25.06A](#), which informs the jury as the final proposition in the issues instructions that the State bears the burden of proving beyond a reasonable doubt that defendant lacked justification to use force in self-defense. The Committee Note to [IPI Criminal 4th No. 24-25.06](#) instructs the trial court to give both to give both No. 24-25.06 and No. 24-25.06A when instructing on self-defense.

As a matter of plain error under the second prong of the plain error rule, the Appellate Court reversed and remanded for a new trial.

Supreme Court Rule 451(c) provides that if the interests of justice so require, substantial defects in criminal jury instructions are not waived by the failure to make timely objections. The purpose of Rule 451(c) is to permit the correction of grave errors and errors in cases that are so factually close that fundamental fairness requires that the jury be properly instructed. Rule 451(c) is coextensive with the plain-error clause of [Illinois Supreme Court Rule 651\(a\)](#).

Under the plain-error doctrine, “[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded” unless the appellant demonstrates plain error. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process.

Although defense counsel failed to tender [IPI Criminal 4th No. 24-25.06A](#), failed to timely object to the absence of the instruction, and failed to include the issue in his posttrial motion, the Appellate Court concluded that the trial judge’s failure to give No. 24-25.06A constituted plain error. The court concluded that the omission of a burden of proof instruction may have caused the jury to believe that defendant had to prove that he acted in self-defense, especially since neither party’s closing argument clarified the burden of proof and the State’s closing argument could easily have been misinterpreted.

**People v. Downs, 2014 IL App (2d) 121156 (No. 2-12-1156, 5/30/14)**

The plain-error doctrine allows a forfeited claim to be reviewed under two circumstances: (1) where a clear and obvious error occurred and the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant, regardless of the error’s seriousness; or (2) when a clear and obvious error occurred and it was so serious that it affected the fairness of trial and challenged the integrity of the judicial process. Clear and obvious means that the law is well-settled at the time of trial. Plain error is not intended as a general savings clause, but is construed as a narrow and limited exception to forfeiture.

Here the trial court erroneously instructed the jury that it was their duty to define reasonable doubt. Although defendant failed to properly preserve this error, and indeed only raised it for the first time on the appeal of an earlier remand to the trial court for a **Krankel**



hearing, the Appellate Court addressed the issue under the second prong of the plain-error doctrine.

The second prong of plain error is equated with structural error. Structural error is a systemic error that erodes the integrity of the judicial process and undermines the fairness of trial. Structural error requires automatic reversal. Structural error is tightly circumscribed, and has only been recognized in a limited number of cases, such as the complete denial of counsel, trial before a biased judge, denial of self-representation, denial of a public trial, and a defective reasonable-doubt instruction.

Because an erroneous reasonable doubt instruction has long been held to constitute structural error and to satisfy the second prong of the plain-error analysis, defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Bruce Kirkham, Elgin.)

### **People v. Fonder, 2013 IL App (3d) 120178 (No. 3-12-0178, 9/30/13)**

The Appellate Court concluded that the trial judge committed plain error by failing to instruct the jury on a critical element of felony resisting arrest - that defendant's conduct proximately caused injury to the officer. Jury instructions are intended to provide the jury with the legal principles applicable to the evidence, so that it might reach a correct conclusion according to the law and the evidence. The failure to instruct the jury on an essential element of the offense satisfied the second prong of the plain error rule - for fundamental error that is so serious that it affects the fairness of the trial and challenges the integrity of the judicial process.

Fundamental fairness requires trial courts to insure that the jury receives basic instructions essential to a fair determination of the case. Here, the missing element was critical because it elevated the offense from a misdemeanor to a felony and increased the sentencing range.

Defendant's conviction was reversed and the cause remanded for further proceedings.  
(Defendant was represented by Assistant Defender Steve Omolecki, Ottawa.)

### **People v. Franklin, 2012 IL App (3d) 100618 (No. 3-10-0618, 6/7/12)**

An error is reversible under the plain error doctrine when (1) A clear or obvious error occurred and the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. The second-prong of the plain-error rule equates with structural errors. An error is structural if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence.

A defective reasonable-doubt instruction is structural error that may be noticed as plain error under the second prong of the plain-error rule.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

### **People v. Getter, 2015 IL App (1st) 121307 (No. 1-12-1307, 1/6/15)**

The State argued that the error in this case, the failure to instruct the jury on self-defense, did not constitute second-prong plain error since the Illinois Supreme Court has limited second-prong plain error to structural error, in particular the six examples of structural error identified by the United States Supreme Court: complete denial of counsel, trial before a biased judge, racial discrimination in grand jury selection, denial of the right to self-representation, denial of a public trial, and defective reasonable doubt instructions.

The Appellate Court rejected the State's argument, holding that while the Illinois Supreme Court has analogized second-prong plain error to structural error, it has never limited it to structural error, and has instead found second-prong plain error in situations other than the six examples cited by the State. In [People v. Sargent, 239 Ill. 2d 166 \(2010\)](#), for example, the Supreme Court found that the failure to instruct the jury on hearsay statements made by a child sex-abuse victim rises to the level of second-prong plain error since it creates a serious risk that the jurors did not understand the applicable law, which would seriously threaten the fairness of trial. This test would be unnecessary if the only question was whether the error fit within one of the six categories of structural error.

The Appellate Court found that the failure to instruct the jury on self-defense constituted second-prong plain error. It reversed defendant's conviction and remanded for a new trial.

Defendant was represented by Assistant Defender David Berger, Chicago.)

**[People v. Hale, 2012 IL App \(4th\) 100949 \(No. 4-10-0949, 3/29/12\)](#)**

The plain error doctrine permits a reviewing court to consider an unpreserved error where a clear and obvious error occurred and either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. The burden of persuasion remains with the defendant. In most cases, a reviewing court cannot correct the forfeited error unless the defendant shows that the error was prejudicial.

An omitted jury instruction constitutes plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial. This rule does not require that defendant prove beyond doubt that her trial was unfair because the omitted instruction misled the jury to convict her. It does require that she show that the error caused a severe threat to the fairness of her trial.

Fundamental fairness requires that the jury be instructed on the elements of the offense charged. It is the essence of a fair trial that the jury not be permitted to deliberate on a defendant's guilt or innocence without being told the essential characteristics of the crime charged.

Defendant demonstrated that the omission of an element of the offense from the instructions caused a severe threat to the fairness of her trial. Defendant was convicted of threatening a public official who was a law enforcement officer, but the jury was not instructed in accord with the statute that because the threat was to a law enforcement officer, the jury had to find that the threat contained specific facts of a unique threat and not a generalized threat of harm. [720 ILCS 5/12-9\(a-5\)](#).

This omission deprived the jury of the guidance needed to decide whether the State proved that additional element. It is possible that the jury concluded that defendant made a generalized threat to the officer, but the statute required more before defendant could be convicted. Because a clear and obvious error occurred that undermined the fairness of defendant's trial and challenged the integrity of the judicial process, the court reversed the conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

**[People v. Jenkins, 2016 IL App \(1st\) 133656 \(No. 1-13-3656, 2/6/16\)](#)**

To convict a defendant of felony resisting or obstructing a police officer, the State must prove that defendant knowingly resisted or obstructed an officer in the performance of an authorized act, and his violation proximately caused an injury to the officer. [720 ILCS 5/31-1\(a\), \(a-7\)](#). Proximate cause of injury is the element that elevates this offense from a Class A misdemeanor to a Class 4 felony.

Here defendant was charged with and convicted of the felony version of this offense, but the trial court committed error by failing to instruct the jury on the proximate cause of injury element.

Although defendant failed to object, the Appellate Court found that the incorrect instruction constituted plain error under the closely balanced evidence prong of the plain error doctrine. The arresting officer testified that as he tried to arrest defendant, defendant struggled with him and kicked him in the face causing an injury. Defendant, by contrast, testified that he did not resist arrest, but only started kicking and screaming in pain after the officer sprayed mace in his face.

The conflicting testimony showed that the jury had to make a judgment of credibility about whether defendant kicked the officer while he was resisting arrest. Where a judgment depends solely on the credibility of witnesses at trial, the evidence is closely balanced.

Defendant's conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Phil Payne, Chicago.)

**[People v. Johnson, 2013 IL App \(2d\) 110535](#)** (Nos. 2-11-0535 & 2-11-0782 cons., 5/31/13)

1. Under Supreme Court Rule 451(c), where a jury instruction suffers from a substantial defect, claims of error are not subject to forfeiture on appeal. An erroneous instruction constitutes a substantial defect when the instruction creates a serious risk that the defendant was incorrectly convicted because the jury did not understand the applicable law, so as to threaten the fundamental fairness of the defendant's trial. To prevail on appeal, the defendant need not prove that the error in the instruction actually misled the jury. Plain error arises in two instances: (1) when the flawed instruction was provided in a case where the evidence was closely balanced; or (2) when the flaw in the instruction is so grave or so serious that it denied the defendant a substantial right and undermined the integrity of the judicial process.

Defendant was tried in a joint trial for UUW by a felon and domestic battery. In addition, the jury heard evidence of two uncharged domestic batteries, as well as threats that accompanied those offenses. At the close of the case, the court instructed the jury that evidence of uncharged conduct could be considered "on the issues of defendant's intent, motive, design, knowledge, absence of mistake, and propensity." When the parties stipulated that defendant had been previously convicted of a felony, which qualified for admission solely to prove an essential element of the charge of UUW by a felon, the court advised the jury that the stipulation "can be used by you like any other evidence in this case to come to your verdict."

These instructions were plain error because they undermined the integrity of the judicial process. At no time during the trial did the court explain to the jury the difference between the charged conduct and the uncharged conduct. As a result, the jury's verdicts may have been based on the uncharged conduct. The court failed to tailor I.P.I. Crim. 4th No. 3.14 based on the evidence presented to make it clear that the jury should not consider the charged domestic battery, the uncharged domestic batteries, or the evidence of defendant's threats, as propensity evidence on the UUW by a felon case, and that the jury could not consider the defendant's felony conviction, the evidence of threats, or the evidence of defendant's gun possession, as propensity evidence in the domestic violence case.

2. Plain-error review is forfeited when defendant invites the error. A defendant's agreement to a procedure later challenged on appeal goes beyond mere waiver. Invited error is sometimes referred to as an issue of estoppel in that a defendant cannot request to proceed in one manner and later contend on appeal that the course of action was in error. To allow the defense to use the exact ruling it procured in the trial court as a vehicle for reversal on appeal would offend notions of fair play, encourage defendants to become duplicitous, and deprive the State of the opportunity to cure the defect.

The defense did not invite the error in the other-crimes instruction by agreeing that the instruction should not be modified. The prosecution tendered the flawed instruction and offered no suggestion to cure the defect when it was pointed out by the trial court. Defense counsel was not duplicitous, but was attempting to mitigate any confusion that could result from a convoluted instruction. At the point at which defense counsel agreed to the flawed instruction, it was too late to untangle the evidence to make it understandable to the jury and the only viable option was to grant a mistrial.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

**[People v. Robinson, 2016 IL App \(1st\) 130484 \(No. 1-13-0484, 6/17/16\)](#)**

An incorrect jury instruction constitutes second prong plain error where it creates a serious risk that the jury incorrectly convicted the defendant because it did not understand the applicable law.

The State charged defendant with aggravated kidnapping under the inducement theory of kidnapping in that he used deceit or enticement to induce the victim to go from one place to another with the intent to secretly confine her against her will. [720 ILCS 5/10-1\(a\)\(3\)](#). But the jury was incorrectly instructed under the actual secret confinement theory of kidnapping that the State had to prove defendant secretly confined the victim against her will. [720 ILCS 5/10-1\(a\)\(1\)](#).

The erroneous jury instruction constituted second prong plain error. The essential issue at trial was whether defendant induced the victim to accompany him using deceit and enticement. The jury instruction omitted this essential element. The jury thus conceivably convicted defendant without finding an essential element of the offense.

The court reversed the aggravated kidnapping conviction.

(Defendant was represented by Assistant Defender Meredith Baron, Chicago.)

**[People v. Turman, \\_\\_\\_ Ill.App.3d \\_\\_\\_, \\_\\_\\_ N.E.2d \\_\\_\\_ \(1st Dist. 2011\) \(No. 1-09-1019, 6/30/11\)](#)**

The plain error doctrine allows review of unpreserved errors when: (1) a clear or obvious error, regardless of the seriousness of the error, occurred where the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the clear or obvious error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

The court found two instructional errors to be plain error:

1. The court committed plain error in instructing the jury that it could "collectively determine what reasonable doubt is." A 17-year-old defendant was charged with criminal sexual assault of 19-year-old college student who had drunk excessive amounts of alcohol, on the theory that he knew that she was unable to give knowing consent to sexual acts. Faced with this difficult task, it was critical that the jury understand what standard of proof it was to utilize. Under the first prong, because of the closeness of the evidence, the clear error threatened to tip the scales of justice against the defendant. Under the second prong, the error

was so serious that it affected the fairness of the defendant's trial and his right to due process, thereby challenging the integrity of the judicial process.

2. The court also found that the omission of language that it was for the jury to determine whether the defendant made the statement from an instruction regarding the jury's consideration of statement evidence (IPI Crim. 4th No. 3.06-3.07) was plain error. At trial, defendant denied making many of the statements contained in a written statement. He testified that the statement was never reread to him even though he signed each page of the statement, and asserted that he did not even know the definition of a word attributed to him in the statement. There was evidence supporting his denial as the grammar and language used by defendant in a note he wrote to the complainant was at odds with the language the prosecution claimed defendant used in the statement. Given the importance of the statement to the State's case and the closely-balanced nature of the evidence, the error "threatened to tip the scales of justice away from the defendant." It also satisfied the second prong of the plain-error rule as it "deprived the defendant of a fair trial and impacted the integrity of the judicial process.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

### **[People v. Ulloa, 2015 IL App \(1st\) 131632 \(No. 1-13-1632, 6/30/15\)](#)**

To prove the offense of conspiracy to deliver cocaine, the State must prove that defendant himself agreed to the delivery. [720 ILCS 570/405.1](#). The State cannot prove conspiracy to deliver by showing that defendant was accountable for the actions of another person who agreed to the delivery. The trial court thus committed plain error under both the closely balanced evidence and serious error prongs by instructing the jury that they could find defendant guilty of conspiracy under a theory of accountability.

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### **§56-2(b)(1)(b) No Plain Error**

**[People v. Durr, 215 Ill.2d 283, 830 N.E.2d 527 \(2005\)](#)** Erroneous jury instruction constitutes plain error only where it creates a serious risk that the jurors incorrectly convicted defendant because they did not understand the applicable law; plain error did not occur where the instructions and trial court's remarks gave the jury the option of a general acquittal as to all conduct charged.

**[People v. Roberts, 75 Ill.2d 1, 387 N.E.2d 331 \(1979\)](#)** Erroneous instruction (incorrect mental state) for attempt murder was not plain error.

**[People v. Huckstead, 91 Ill.2d 536, 440 N.E.2d 1248 \(1982\)](#)** Plain error did not occur where judge failed to instruct jury on State's burden to prove lack of justification to use force. Compare, **[People v. Berry, 99 Ill.2d 499, 460 N.E.2d 742 \(1984\)](#)** (same instruction defect was plain error where the evidence was close).

**[People v. Burns, 144 Ill.App.3d 345, 494 N.E.2d 872 \(4th Dist. 1986\)](#)** Where the evidence was not factually close, neither the failure to instruct on the State's burden to disprove an affirmative defense nor the improper use of a prior consistent statement was plain error.



**People v. Carter**, \_\_\_ Ill.App.3d \_\_\_, 939 N.E.2d 46 (1st Dist. 2010) (No. 1-08-1671, 11/1/10)

The plain error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or (2) the error is so fundamental and of such magnitude that the defendant is denied the right to a fair trial and the error must be remedied to preserve the integrity of the judicial process.

The jury was given instructions for indecent solicitation of a child that omitted two of the elements of the offense – that defendant had the intent to commit the offense of aggravated criminal sexual abuse, and that defendant knew that the person he solicited was under 17 years of age. These elements were added by a 1999 amendment to the statute, but were not included in the jury instructions. The court found that the defective instructions were not plain error.

First, the court found that the evidence on the omitted elements was not closely balanced. On the issue of defendant's knowledge of the age of the minor, the minor testified that he told defendant he was 13, the minor appeared to be under the age of 17, and defendant admitted that he knew he was a minor. With respect to the issue of defendant's intent to commit aggravated criminal sexual abuse, the court found the evidence overwhelming. Defendant testified that he went to an upstairs room to retrieve his marijuana after the minor shortchanged him on a sale. The minor testified that defendant talked about sex when they spoke on the telephone, told the minor that he wanted him to see his "dick," drove to the minor's house where he pulled down his pants and told the minor to suck his penis, and the minor's grandmother testified that she found defendant in an upstairs room of her house with the door closed, his pants down, and his penis erect. The jury found the minor's version credible.

The court attributed no significance to the jury's acquittal of aggravated criminal sexual abuse. Although the minor testified that he performed fellatio on defendant, his grandmother saw no act of penetration. The acquittal reflected only the jury's finding that penetration was not proved beyond a reasonable doubt.

With respect to the second prong of the plain error rule, the court found that the defective instructions were not a threat to the fairness of the trial. The essential disputed issue in the case was the credibility of the defendant versus the credibility of the minor and his grandmother. Because the overwhelming evidence persuaded the jury to believe the prosecution's version of the facts, the omitted elements were not disputed issues essential to the jury's determination of defendant's guilt or innocence.

(Defendant was represented by Assistant Defender Patrick Cassidy, Chicago.)

**People v. Daniel**, 2014 IL App (1st) 121171 (No. 1-12-1171, 5/22/14)

The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Although this was both an instructional error and an **Apprendi** error, neither was reversible under the plain-error doctrine.

The plain-error doctrine permits a reviewing court to consider a forfeited error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) the error is so serious that it affected the fairness of defendant's trial and the



integrity of the judicial process, regardless of the closeness of the evidence.

The first prong of the plain-error doctrine did not apply because there was overwhelming evidence that defendant was armed with a firearm, and indeed it was undisputed at trial that he carried a firearm. The second prong did not apply because Illinois courts have narrowed this prong to errors that are structural: systemic errors that erode the integrity of the judicial process and undermine the fairness of trial. Although the jury instructions misstated the law, they did not fall within the class of errors deemed structural. Additionally, the Illinois Supreme Court has specifically held that **Apprendi** errors do not fall within the narrow category of structural errors that qualify for the second prong of plain error. [People v. Crespo, 203 Ill.2d 335 \(2003\).](#)

The conviction was affirmed.

(Defendant was represented by Assistant Defender Emily Hartman, Chicago.)

[People v. Marcos, 2013 IL App \(1st\) 111040 \(No. 1-11-1040, 8/16/13\)](#)

[People v. Sargent, 239 Ill. 2d 166, 940 N.E.2d 1045 \(2010\).](#) held that the failure to give [IPI Criminal 4th No. 11.66](#), is clear and obvious error when out-of-court statements of a child are admitted pursuant to [725 ILCS 5/115-10](#). No. 11.66 informs the jury that it is for the jury to decide if the statements were made and what weight to give to them, and in making that determination, the jury should consider the age and maturity of the child, the nature of the statements, and the circumstances under which they were made. The error in failing to give No. 11.66 rises to the level of plain error if the evidence at trial is closely balanced.

The out-of-court statements of the child may be considered on the prosecution side of the scale in judging whether the evidence is closely balanced where the jury is instructed in accordance with [IPI Criminal 4th No. 1.02](#). No. 1.02 informs the jury that it is the judge of the credibility of the witnesses and the weight to be given their testimony and that in making that determination the jury may consider various factors, including the age of the witness. This instruction is not identical to No. 11.66, but conveys similar principles regarding the jury's role and the factors it may consider in assessing credibility.

The Appellate Court concluded that the evidence was not closely balanced where the sexual assault was proved by the testimony of the child at trial, her out-of-court statements to her mother and a social worker, defendant's admission to the child's mother, and defendant's statement to the police. The error, though clear and obvious, did not rise to the level of plain error.

(Defendant was represented by Assistant Defender Jennifer Bontrager, Chicago.)

[People v. McNeal, \\_\\_\\_ Ill.App.3d \\_\\_\\_, \\_\\_\\_ N.E.2d \\_\\_\\_ \(1st Dist. 2010\) \(No. 1-08-2264, 9/30/10\), superceded by 405 Ill.App.3d 647, 955 N.E.2d 32](#)

Instructing the jury that sexual penetration involving a body part requires only contact, not an intrusion, was error, but not plain error, given that the evidence was not closely balanced or the error so fundamental as to affect the fairness of the trial.

The dissent (Gordon, R., J.) would find plain error based on the erroneous penetration instruction. Complainant, a non-native English speaker, testified that she put her finger in her own vagina. Defendant's statements to the police were only that he told her to touch herself or touch her clitoris. Therefore the evidence on this issue was closely balanced and the issue should be noticed as plain error.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

**People v. Ware, 2014 IL App (1st) 120485 (No. 1-12-0485, 3/14/14)**

1. The State charged defendant with armed robbery while armed with a firearm, but the jury was incorrectly instructed that the charge was armed robbery while armed with a dangerous weapon. Although this was error, it was not reversible under the second prong of the plain-error doctrine.

Errors under the second prong are presumptively prejudicial and require automatic reversal only if they are structural, i.e., systemic errors that serve to erode the integrity of the judicial process and undermine the fairness of the trial. A jury instruction error is plain error only when it creates a serious risk the jurors incorrectly convicted defendant because they did not understand the applicable law.

The instructions here misdescribed an element of the offense by referring to a “dangerous weapon,” rather than a “firearm.” But a firearm is still a class of dangerous weapon, and the jury’s verdict, based on substantial evidence that defendant carried a firearm, implicitly found that defendant was armed with a firearm. The error thus did not create a substantial risk that the jurors incorrectly convicted defendant because they did not understand the applicable law.

2. Defendant also argued that the trial court improperly refused to consider a plea agreement the parties reached after the trial had commenced. Defendant forfeited the issue by failing to object at trial, but argued that forfeiture should not apply because the error involved conduct by the trial judge.

Although judicial misconduct may provide a basis for relaxing forfeiture under the **Sprinkle** doctrine, this exception applies only in extraordinary situations, such as when a judge makes inappropriate comments to the jury. The judge’s conduct here did present extraordinary or compelling reasons to relax the forfeiture rule.

The conviction was affirmed.

(Defendant was represented by Assistant Defender Kathleen Hill, Chicago.)

**People v. Watt, 2013 IL App (2d) 120183 (No. 2-12-0183, 11/21/13)**

The plain-error doctrine allows a reviewing court to reach a forfeited error in two instances: where the evidence is so closely balanced that the jury’s guilty verdict might have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. The second prong of the rule deals with presumptively prejudicial errors, which must be remedied although they might not have affected the outcome. A presumptively prejudicial error occurs only where the error is deemed structural. An instruction that either omits an element of the offense or misdescribes an element is not structural error.

It was error to instruct the jury that it could convict defendant of armed robbery based on a finding that he was armed with a dangerous weapon, where he was charged with committing armed robbery with a firearm. The Appellate Court declined to find plain error where the evidence was not closely balanced on the issue of guilt and the defect in the instructions was only a misdescription of an element that did not rise to the level of structural error.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

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**§56-2(b)(2)**

## Prosecutorial Misconduct

### §56-2(b)(2)(a)

#### Plain Error

**People v. Fort**, 14 Ill.2d 491, 153 N.E.2d 26 (1958) Prosecutor's closing argument was plain error; where the argument is so prejudicial as to prevent defendant from receiving a fair trial, a reviewing court may consider the error though no objection was interposed in the trial court.

**People v. Mullen**, 141 Ill.2d 394, 566 N.E.2d 222 (1990) Prosecutor's unsubstantiated closing remarks (that witnesses were reluctant to testify out of fear) at defendant's jury trial for murder constituted plain error because the evidence was closely balanced and littered with discrepancies. Further, even if the evidence was not closely balanced, the second prong of the plain error would have applied because the remarks were based on evidence that the judge specifically excluded (the judge specifically admonished the attorneys not to reference one witness's initial fear to testify). See also, **People v. Porter**, 372 Ill.App.3d 973, 866 N.E.2d 1249 (3d Dist. 2007) (prosecutor's unsubstantiated remarks were reviewed as a matter of plain error under the first prong of the rule).

**People v. Blue**, 189 Ill.2d 99, 724 N.E.2d 920 (2000) Due process was violated by the cumulative effect of several errors; reversal was required despite the existence of "overwhelming" evidence of guilt. The court concluded that because the errors "created a pervasive pattern of unfair prejudice" and left it unable to "confidently state that defendant's trial was fundamentally fair," reversal was necessary to "preserve the integrity of the judicial process." See also, **People v. Johnson**, 208 Ill.2d 53, 803 N.E.2d 405 (2003) (a pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of judicial proceedings as to constitute plain error; prosecutorial misconduct intended to encourage a verdict based on emotion adversely affects a defendant's substantial right to a fair trial and undermines the trustworthiness and reputation of the judicial process; remanding for a new trial due to prosecutorial misconduct); **People v. Young**, 347 Ill.App.3d 909, 807 N.E.2d 1125 (1st Dist. 2004) (because the prosecutor's actions endangered the integrity of the judicial process, the conviction was reversed and the cause remanded for a new trial); **People v. Liner**, 356 Ill.App.3d 284, 826 N.E.2d 1274 (5th Dist. 2005) (pattern of prosecutorial misconduct constituted plain error).

**People v. Weinstein** 35 Ill.2d 467, 220 N.E.2d 432 (1966) The prosecutor's repeated comments in closing argument (that the defendant had the burden of introducing evidence to create a reasonable doubt) was plain error.

**People v. Dukett**, 56 Ill.2d 432, 308 N.E.2d 590 (1974) Prosecutor's comments in closing argument (appealing to racial prejudice) were considered as plain error, but held to be harmless.

**People v. Nelson**, 193 Ill.2d 216, 737 N.E.2d 632 (2000) Prosecutor committed plain error under both prongs of the rule by presenting mug shot evidence and by making improper closing argument. Compare, **People v. Killebrew**, 55 Ill.2d 337, 303 N.E.2d 377 (1973).

**People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978) Prosecutor committed plain error by

disclosing that defendant's accomplices had pleaded guilty.

**People v. Vasquez**, 8 Ill.App.3d 679, 291 N.E.2d 5 (1st Dist. 1972) State's closing argument, which included facts outside the record and said that the prosecutor was the 13th juror, entitled defendant to a new trial despite the absence of an objection. Errors deprived defendant of a fair trial.

**People v. Williams**, 333 Ill.App.3d 204, 775 N.E.2d 104 (1st Dist. 2002) The court reviewed as a matter of plain error the prosecutor's improper cross-examination of defendant (prosecutor made unsupported insinuations concerning defendant's motives and repeated such assertions in closing argument). Although the evidence was not closely balanced, the misconduct "created a situation so fundamentally unfair and of such magnitude as to deny defendant a fair trial."

**People v. McMillan**, 130 Ill.App.2d 633, 264 N.E.2d 554 (2d Dist. 1970) Evidence and argument concerning defendant's other crimes were plain error.

**People v. Monaghan**, 40 Ill.App.3d 322, 352 N.E.2d 295 (1st Dist. 1976) The prosecutor's comment upon defendant's exercise of his right to silence was considered as plain error. See also, **People v. Wanke**, 311 Ill.App.3d 801, 726 N.E.2d 142 (2d Dist. 2000) (the State committed plain error by using defendant's silence at the time of his arrest to disprove an insanity defense).

**People v. Burton**, 63 Ill.App.3d 915, 380 N.E.2d 929 (1st Dist. 1978) Prosecutor committed plain error by disclosing that defendant had testified at prior trial (but not at this trial) and suggesting that there was evidence favorable to the State that the jury could not hear.

**People v. Wilson**, 199 Ill.App.3d 792, 557 N.E.2d 571 (1st Dist. 1990) Plain error occurred where the prosecutor, during closing argument, expressed personal beliefs regarding the credibility of witnesses. The conviction rested primarily on the complainant's testimony, and a defense witness testified that the complainant had a motive to lie.

**People v. Thomas**, 146 Ill.App.3d 1087, 497 N.E.2d 803 (5th Dist. 1986) The prosecutor's comments in closing argument (that "there's nobody here for the People, just [the jurors]") was plain error.

**People v. Littlejohn**, 144 Ill.App.3d 813, 494 N.E.2d 677 (1st Dist. 1986) The prosecutor's closing argument (which aroused the sympathy and passion of the jury toward the victim) was plain error.

**People v. Ridley**, 199 Ill.App.3d 487, 557 N.E.2d 378 (1st Dist. 1990) Plain error occurred where the prosecutor, during closing argument, claimed that in order to believe defense witnesses the jury must find that the State witnesses were lying. The evidence was closely balanced; further, the defense witnesses did not directly contradict the State witnesses, who could have simply been mistaken. See also, **People v. Miller**, 302 Ill.App.3d 487, 706 N.E.2d 947 (1st Dist. 1998).

**People v. Maounis**, 309 Ill.App.3d 155, 722 N.E.2d 749 (1st Dist. 1999) The prosecutor

committed plain error in closing argument by commenting on defendant's absence from home at Christmas and urging the jury to find defendant guilty of armed robbery based on his failure to spend the holidays with his family.

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**Cumulative Digest Case Summaries §56-2(b)(2)(a)**

**People v. Carbajal, 2013 IL App (2d) 111018 (No. 2-11-1018, 3/7/13)**

The plain-error doctrine contained in Supreme Court Rule 615(a) provides a narrow exception to the general rule of procedural default. A reviewing court may consider an unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. The defendant bears the burden of persuasion.

The evidence against defendant in a burglary prosecution was closely balanced. The case boiled down to the issue of defendant's intent at the moment he entered the building. Defendant contended he had no intent to commit a theft and that his companion did not discuss committing a theft until after they entered the building. While defendant fled when the police arrived, this evidence of his consciousness of guilt could have led the jury to find him guilty of criminal trespass rather than burglary. Defendant's written statement could support the inference that he was aware of his companion's plan to commit a theft, but the statement did not indicate *when* the companion revealed his plan.

The conduct of the prosecutor in misstating the law of accountability and shifting the burden of proof to the defendant threatened to tip the scales of justice against the defendant. Even though, in response to the defense objection, the court admonished the jury that it would instruct the jury as to the law, the prejudicial effect of an improper argument cannot always be erased from the minds of the jurors by an admonition by the court. Therefore, the prosecutor's improper comments were noticed as plain error.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

**People v. Jackson, 2012 IL App (1st) 102035 (No. 1-10-2035, 7/10/12)**

A prosecutor's misstatement of the evidence may be reviewed as plain error where the evidence is close regardless of the seriousness of the error, or where the error is serious regardless of the closeness of the evidence. The evidence is closely balanced where it rests solely on the credibility of witnesses at trial.

Defendant was charged with aggravated unlawful use of a weapon when the police recovered a gun from his car. Defendant denied knowledge of the gun and testified that other people had been in the car that day. A passenger was also in the car when it was stopped. In closing argument, the prosecutor misstated the evidence when he remarked that defendant told the officers he found a gun in his car.

The prosecutor's misstatement of the evidence was plain error. The determinative issue at trial was defendant's knowledge that a gun was in his car when he was pulled over by the police. The jury's judgment rested solely on the credibility of witnesses at trial. Defendant had no opportunity to respond to the prosecutor's misstatement because it was made during rebuttal. Given the closeness of the evidence and the fact that the erroneous argument spoke directly to the issue of defendant's knowledge of the gun, the error substantially prejudiced

defendant and was a material factor in his conviction. The court's instruction to the jury that closing argument is not evidence was insufficient to cure the error.

The Appellate Court reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

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### **§56-2(b)(2)(b)**

#### **No Plain Error**

**People v. Herrett**, 137 Ill.2d 195, 561 N.E.2d 1 (1990) Prosecutor's comments on defendant's post-arrest silence and failure to testify were not plain error. The evidence was not closely balanced, and the comments were not of such magnitude as to clearly deprive defendant of a fair trial or require invocation of the plain error rule to preserve the integrity and reputation of the judicial process. See also, **People v. Stewart**, 104 Ill.2d 463, 473 N.E.2d 1227 (1984) (comment on post-arrest silence); **People v. Lucas**, 88 Ill.2d 245, 430 N.E.2d 1091 (1981) (comment on post-arrest silence); **People v. Whitehead**, 116 Ill.2d 425, 508 N.E.2d 687 (1987) (comment on defendant's failure to testify); **People v. Phillips**, 127 Ill.2d 499, 538 N.E.2d 500 (1989); **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990); **People v. Soloman**, 116 Ill.App.3d 481, 451 N.E.2d 953 (5th Dist. 1983).

**People v. Lucas**, 88 Ill.2d 245, 430 N.E.2d 1091 (1981) Prosecutor's closing remark on defendant's silence after arrest did not constitute plain error because the evidence was not closely balanced. See also, **People v. Herrett**, 137 Ill.2d 195, 561 N.E.2d 1 (1990) (comments on defendant's post-arrest silence and his failure to testify).

**People v. Moss**, 205 Ill.2d 139, 792 N.E.2d 1217 (2001) Prosecutor's improper cross-examinations of defense experts and improper closing arguments did not amount to plain error.

In a partially concurring and partially dissenting opinion, Justices Freeman and Kilbride found that the court's previous attempts to send a "message" about prosecutorial misconduct have been unsuccessful, predicted that improper prosecutorial tactics will likely be repeated "because there are simply no adverse consequences for those prosecutors whose behavior crosses the line," and concluded that the frequency with which the court sees improper prosecutorial arguments "is not only alarming, but causes legitimate public concerns regarding the fairness and integrity of these proceedings."

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### **Cumulative Digest Case Summaries §56-2(b)(2)(b)**

#### **People v. Adams**, 2012 IL 111168 (No. 111168, 1/20/12)

Noting a conflict in Illinois authority, the Supreme Court found that the prosecutor erred in closing argument by stating, in the absence of any evidence concerning the consequences of a police officer lying in court, that police officers would not risk their "credibility," "jobs," and "freedom" by lying in court. However, the court held that the argument did not constitute plain error.

The plain error doctrine allows a reviewing court to consider forfeited error where the



evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant, or where the error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. Under both prongs of the harmless error test, the burden of persuasion remains with the defendant.

In determining whether the closely balanced evidence prong has been met, the reviewing court makes a “common sense assessment” of the evidence within the context of the individual case. The court concluded that where defendant’s explanation of events was highly improbable, the jury was properly instructed that counsel’s arguments were not evidence and that the jury was to judge credibility, and the improper comments were not likely to inflame the passions of the jury, the statements did not tip the scales of justice against the defendant.

Furthermore, the improper comments did not amount to plain error under the fundamental fairness prong where they did not affect the fairness of the trial to the extent that the integrity of the judicial process was threatened.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

### **People v. Euell, 2012 IL App (2d) 101130 (No. 2-10-1130, 5/16/12)**

Comments by the prosecutor misstating the burden of proof are plain error only when they are either so inflammatory that the defendant could not have received a fair trial or so flagrant as to threaten a deterioration of the judicial process.

The court rejected cases finding plain error on the basis that misstating the burden of proof to any extent compromises the fairness of the judicial process and cannot be tolerated. That analysis is inconsistent with cases holding that where such an error is preserved for review, reversal is appropriate only where the improper remarks result in substantial prejudice to the defendant’s right to a fair trial.

The prosecutor’s argument improperly shifted to defendant the burden of proof and to elicit exculpatory evidence. The comments were not plain error because they were not so inflammatory or flagrant as to deny defendant a fair trial. The comments were tied to the lack of evidence supporting defendant’s theory that someone other than defendant delivered the drugs. This theory was flatly refuted by the evidence presented. Although the prosecutor erred in stating that the defendant had not supported his theory, he did not directly state that defendant had a burden to do so. “[T]he clear upshot of the State’s comments was that all the evidence pointed one way, and in that regard they were unassailably accurate.”

(Defendant was represented by Assistant Defender Christopher McCoy, Elgin.)

### **People v. Hanson, 2014 IL App (4th) 130330 (No. 4-13-0330, 12/30/14)**

Under 730 ILCS 5/5-4.5-50(d) a defendant must file a written motion challenging “the correctness of a sentence or any aspect of the sentencing hearing” within 30 days of the imposition of sentence. The written post-sentencing motion allows the trial court to review defendant’s contentions of sentencing error and save the delay and expense of waiting until appeal to correct any errors. It also gives the Appellate Court the benefit of the trial court’s reasoned judgment on potential issues.

1. Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant’s claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made

no effort to point this error out at trial and create a clear record of the trial court's actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to "use the transcript of the sentencing hearing as a crystal ball" to understand the trial court's thinking. The Appellate Court refused to engage in "mind-reading" and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain error since the right to be sentenced lawfully affects a defendant's fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

2. The court also declined to review as plain error, despite the State's agreement, defendant's claim that the trial court imposed a restitution order without an evidentiary basis for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts "a few ten-dollar phrases" such as "substantial rights," "grave error," and the "fundamental right to liberty." Since all sentencing errors arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court's error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

### **[People v. Marshall, 2013 IL App \(5th\) 110430 \(No. 5-11-0430, 9/13/13\)](#)**

A reviewing court may consider an unpreserved error if either: (1) the evidence is so closely balanced that the jury's verdict may have resulted from the error rather than from the evidence; or (2) the error was so fundamental and of such a magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

Where race was a consistent theme in the presentation of the State's theory of the case to the jury, the error could be noticed under the second prong of the plain error rule.

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### **§56-2(b)(3)**

#### **§56-2(b)(3)(a)**

#### **Plain Error**

**[People v. Smith, 141 Ill.2d 40, 565 N.E.2d 900 \(1990\)](#)** Improper motive evidence relating to gang-related activity, and the prosecutor's comments thereon in closing argument, constituted plain error because the evidence was closely balanced.

**[People v. Harrison, 25 Ill.2d 407, 185 N.E.2d 244 \(1962\)](#)** The Court reached an issue concerning policeman's hearsay testimony (that witness had made pre-trial identification of defendant) despite lack of objection in trial court. "[The] probative value [of inadmissible evidence] is not enhanced by the fact that it was received without objection." See also, **[People](#)**

**v. Flournoy**, 336 Ill.App.3d 739, 784 N.E.2d 353 (1st Dist. 2002) (the plain error rule applied to defendant's contention that the trial court erred in permitting the State's eyewitness and a detective to testify to hearsay identification evidence implicating defendant because the evidence was closely balanced (only a single witness identified defendant at trial, there was no physical evidence implicating him, and defendant presented alibi testimony by three witnesses)).

**People v. Valko**, 201 Ill.App.3d 462, 559 N.E.2d 104 (1st Dist. 1990) The improper introduction of hearsay details of the complaint (by the victim of a sex offense) was plain error because the evidence was closely balanced. Although a portion of the improper evidence was harmless, other portions were prejudicial. See also, **People v. Andino**, 99 Ill.App.3d 952, 425 N.E.2d 1333 (2d Dist. 1981) (the court considered issue regarding the admission of hearsay testimony (a prior out-of-court statement by the complainant) as "plain error" because the hearsay tended to enhance the credibility of the complainant, whose testimony was the sole evidence of guilt); **People v. McMurtry**, 279 Ill.App.3d 865, 665 N.E.2d 450 (1st Dist. 1996) (plain error doctrine applied where State's improper impeachment of its own witnesses involved most of State's evidence on crucial issue).

**People v. Wheeler**, 186 Ill.App.3d 422, 542 N.E.2d 524 (4th Dist. 1989) The State's improper introduction of a prior consistent statement of its witness (and the prosecutor's comments thereon) constituted plain error; evidence improperly bolstered the testimony of a witness on whose testimony the State's case depended "almost entirely." Compare, **People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990).

**People v. Carter**, 297 Ill.App.3d 1028, 697 N.E.2d 895 (1st Dist. 1998) Improper testimony of other crimes and prosecutorial remarks designed to inflame the jury were plain error where the errors might have affected the jury's deliberations.

**People v. Niebes**, 69 Ill.App.3d 381, 387 N.E.2d 800 (1st Dist. 1977) Use at trial of victim's preliminary hearing testimony was considered as plain error.

**People v. Roberts**, 133 Ill.App.3d 731, 479 N.E.2d 386 (5th Dist. 1985) State's cross-examination of several defense character witnesses (i.e., asking them if they were aware of defendant's prior arrests for burglary and unlawful possession of a firearm) was plain error. The evidence was closely balanced, and there is "prejudice inherent in presenting evidence of a defendant's prior offenses to the jury."

**People v. Parham**, 141 Ill.App.3d 149, 490 N.E.2d 65 (1st Dist. 1986) Use of statement obtained after defendant requested counsel was plain error.

**People v. Strong**, 316 Ill.App.3d 807, 737 N.E.2d 687 (3d Dist. 2000) Plain-error rule applied to issue concerning the erroneous denial of defendant's motion to suppress where the evidence was closely balanced. The court rejected the argument that the evidence was not closely balanced in light of defendant's admission that he purchased the drugs - it was "precisely" defendant's statement that was the subject of the motion to suppress.

**People v. Jackson**, 299 Ill.App.3d 323, 702 N.E.2d 590 (5th Dist. 1998) As a matter of plain error, the judge erroneously admitted a handgun that was not shown to be suitable for

committing the offense. A "serious injustice" to defendant would occur if the court did not consider the issue.

**People v. Feazell**, 386 Ill.App.3d 55, 898 N.E.2d 1077 (1st Dist. 2007) The court reached a Crawford issue as a matter of plain error, although defendant failed to preserve the issue in a post-trial motion.

**People v. Johnson**, 376 Ill.App.3d 175, 875 N.E.2d 1256 (1st Dist. 2007) The plain error rule applied to the issue of the adequacy of the foundation for computer-generated transcripts. The failure to require an adequate foundation prejudiced the right to fair trial - "[g]iven the ambiguity of the court's ruling about what evidence was suppressed and the uncertainty about what evidence the trial court relied on to convict, we can only conclude that defendant was unfairly prejudiced."

**People v. Stack**, 261 Ill.App.3d 191, 633 N.E.2d 42 (4th Dist. 1994) Plain error occurred where the trial court erroneously believed that it was required to exclude evidence of self-defense due to a discovery violation.

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**Cumulative Digest Case Summaries §56-2(b)(3)(a)**

**People v. Fillyaw and Parker**, 409 Ill.App.3d 302, 948 N.E.2d 1116 (2d Dist. 2011)

Supreme Court Rule 615(a) allows consideration of a non-preserved error as plain error where the error affects a defendant's substantial rights.

The admission of a nontestifying co-defendant's statement implicating Parker in the commission of the offense was plain error. Because the error implicated Parker's due process and confrontation clause rights, it necessarily affected his substantial rights. The seriousness of the error was compounded by the repeated references to the statement at trial and in the prosecutor's argument to the jury, the admission of the statement as substantive evidence, and the fact that a copy of the statement accompanied the jury during its deliberations.

(Defendant Fillyaw was represented by Assistant Defender Kathleen Hamill, Elgin and Defendant Parker was represented by Assistant Defender Yasaman Navai, Chicago.)

**People v. Gray**, 406 Ill.App.3d 466, 941 N.E.2d 338 (1st Dist. 2010)

The court found the improper impeachment of a defense witness to be plain error because the evidence at trial was closely balanced. Two witnesses testified for the prosecution that defendant was the shooter. Three defense witnesses identified one of the prosecution witnesses as the shooter. The physical evidence showed that all of the shots were fired from a single gun, but did not tend to prove the identity of the shooter. The testimony of the witnesses was not inherently incredible or severely self-contradictory. The case came down to a question of credibility. The lengthy jury deliberations, coupled with the jury's note informing the court that the jury could not reach a consensus, also show that the jury considered the evidence to be closely balanced. The improperly-admitted evidence could have swayed the jury to credit the testimony of the prosecution witnesses and therefore its admission was plain error.

(Defendant was represented by Assistant Defender Tomas Gonzalez, Chicago.)

**People v. Hood**, 2014 IL App (1st) 113534 (No. 1-11-3534, 10/6/14)

1. The Appellate Court held that defendant had been denied his right to confrontation by not being present at an evidence deposition conducted pursuant to [Illinois Supreme Court Rule 414](#), which allows a party to take a deposition if there is a substantial possibility that the witness will not be available to testify at trial. The prosecutor and defense counsel, but not defendant, were present for the video deposition, and defense counsel cross-examined the witness. Although defense counsel stated that she had waived defendant's presence, the record did not show that defendant personally and knowingly waived his right to confrontation.

The court also held that defendant did not properly waive his confrontation rights under Rule 414. Rule 414(e) provides that defendant and defense counsel may waive defendant's confrontation rights at a deposition in a written waiver. The court held that it was error to admit the deposition without a written waiver.

2. Although defendant failed to raise either issue below, the court reached the issues under the second prong of the plain error doctrine. Under this prong, a reviewing court may review procedurally defaulted claims where the error is so serious that defendant was denied a substantial right and thus a fair trial. Prejudice is presumed under the second prong due to the importance of the right involved.

The right to confront witnesses is a substantial constitutional right. Both errors involved the right to confront witnesses and thus they both concerned a substantial right reviewable under the second prong of plain error.

3. The dissent would not have found that the errors fell within the second prong of plain error. The second prong only applies to structural errors, a very limited class of cases which does not include defendant's right to be present at a deposition.

(Defendant was represented by Supervisor Shawn O'Toole, Chicago.)

**People v. Jackson**, 399 Ill.App.3d 314, 926 N.E.2d 786 (1st Dist. 2010) (No. 1-04-3660, 3/10/10)

1. The trial court erred by admitting evidence of defendant's drug use to prove motive to commit murder. (See **EVIDENCE**, §19-24(b)(5)).

2. Although at trial defendant objected on hearsay grounds to the admission of his statements about his drug use, he did not argue that the evidence was improper because it revealed the commission of other crimes. The court concluded that the plain error rule applied, however, because the evidence was closely balanced and because the error was of sufficient magnitude to deny a fair trial.

(Defendant was represented by Assistant Defender Kari Firebaugh, Chicago.)

**People v. Salem**, 2016 IL App (3d) 120390 (No. 3-12-0390, 3/21/16)

The State improperly impeached defendant with proof of his guilty plea because the plea had not yet resulted in a sentence and final judgment of conviction. While a guilty plea is an admission of guilt, it does not become a final judgment of conviction until the court imposes a sentence.

Although defendant did not object to the error, the improper admission of this evidence along with other prior convictions that were inadmissible because they were over 10 years old constituted second prong plain error since it "was so egregious that it eroded the integrity of the judicial process and rendered defendant's trial fundamentally unfair."

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

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### **§56-2(b)(3)(b)** **No Plain Error**

**People v. Henderson**, 142 Ill.2d 258, 568 N.E.2d 1234 (1990) The introduction of a State's witness's prior consistent statement was not plain error where the outcome of trial could not have been affected. See also, **People v. White**, 181 Ill.App.3d 798, 537 N.E.2d 1315 (1st Dist. 1989) (prior inconsistent statement); **People v. Burns**, 144 Ill.App.3d 345, 494 N.E.2d 872 (4th Dist. 1986) (use of prior consistent statement was not plain error where the evidence was not factually close). Compare, **People v. Wheeler**, 186 Ill.App.3d 422, 542 N.E.2d 524 (4th Dist. 1989).

**People v. Killebrew**, 55 Ill.2d 337, 303 N.E.2d 377 (1973) The State's use of "mug shots" was not plain error; conviction could not have been affected. Compare, **People v. Nelson**, 193 Ill.2d 216, 737 N.E.2d 632 (2000).

**People v. Sanders**, 99 Ill.2d 262, 457 N.E.2d 1241 (1983) The introduction of privileged communications was not plain error because the improper evidence "did no more than duplicate the incriminating content of [another] conversation which was properly admitted."

**People v. Conley**, 118 Ill.App.3d 122, 454 N.E.2d 1107 (1st Dist. 1983) State's introduction of allegedly involuntary, inculpatory statements was not plain error. Defendant did not file a motion to suppress, and did not raise the issue at trial or in post-trial motions. Also, "the record is such that we cannot ascertain what would have been the result of a motion to suppress."

**People v. Richmond**, 201 Ill.App.3d 130, 559 N.E.2d 202 (4th Dist. 1990) Admission of officer's testimony that defendant requested attorney upon learning of the victim's death did not amount to plain error.

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### **Cumulative Digest Case Summaries §56-2(b)(3)(b)**

**People v. Mandarino**, 2013 IL App (1st) 111772 (No. 1-11-1772, 6/28/13)

Defendant, a former police officer, was prosecuted for aggravated battery after he beat a motorist with a collapsible baton during a traffic stop. On appeal, defendant argued that the trial erred by admitting lay opinion that defendant's use of force against the motorist was unreasonable and unnecessary. The Appellate Court concluded that defendant forfeited the issue where he did not argue at trial or in the post-trial motion that the testimony was inadmissible lay opinion. Although trial counsel raised other objections, appellate arguments that do not correspond to objections raised at trial are forfeited.

Even if the lay opinion was improperly introduced, the plain error rule did not apply. The court found that the evidence was not closely balanced where a video recording of the incident supported the trial court's finding that defendant's conduct was "unprovoked, unnecessary, and totally unacceptable." The video showed that the complainant did not threaten or move toward defendant or make any movement suggesting he was attempting to escape. At most, the only "aggressive behavior" displayed by the complainant was swearing



at the defendant during a traffic stop, “something that police officers deal with often in their careers.”

[People v. Price, 404 Ill.App.3d 324, 935 N.E.2d 552 \(1st Dist. 2010\)](#)

The factors enunciated in [Neil v. Biggers, 409 U.S. 188 \(1972\)](#), for evaluating the reliability of an eyewitness identification despite the suggestiveness of an identification procedure, may be utilized to determine whether the evidence overwhelmingly favors the State or is sufficiently closely balanced to require a new trial under the plain-error doctrine.

The State’s case consisted of a police officer’s testimony that he observed defendant engage in three apparent drug transactions, and then observed defendant hand off the drugs to a woman when the police approached. Defendant testified that the woman was a known drug dealer and that he was an innocent bystander who happened to be visiting in the area.

Applying the [Neil v. Biggers](#) factors, the court determined that the evidence was sufficiently closely balanced that plain error resulted from the trial court’s failure to require disclosure of the surveillance location. The opportunity of the officer to observe did not weigh heavily in favor of the State because the officer observed from a distance of 60 feet, at night time, without binoculars, for ten minutes. The factors of the level of certainty of the witness and the length of time between the crime and confrontation favored the State. The remaining factors weighed against the State. There was no indication what degree of attention the officer paid during the surveillance, but he was unable to explain when the woman first appeared on the scene. The officer provided no description of the offender to his fellow officers and at trial was unable to provide any description other than race of the suspect or the persons with whom he engaged in transactions.

(Defendant was represented by Assistant Defender Kathleen Flynn, Chicago.)

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**§56-2(b)(4)**

**Trial Judge’s Remarks**

[People v. Finn, 17 Ill.2d 614, 162 N.E.2d 354 \(1959\)](#) Plain error occurred where the judge remarked to the jury that defendant's insanity claim was a sham.

[People v. Kelley, 113 Ill.App.3d 761, 447 N.E.2d 973 \(1st Dist. 1983\)](#) The trial judge committed plain error where, before voir dire began, he expressed to the prospective jurors his belief that the evidence would establish defendant's guilt. The judge's remark "impinges upon the integrity of our judicial system. . . ."

[People v. McDaniels, 144 Ill.App.3d 459, 494 N.E.2d 1275 \(5th Dist. 1986\)](#) The trial judge at a bench trial committed plain error when it stated that it "seems to be pretty ridiculous to claim self-defense." The judge cannot evaluate the merits of the defense before it has been presented.

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Cumulative Digest Case Summaries **§56-2(b)(4)**

[In re Danielle J., 2013 IL 110810 \(No. 110810, 12/19/13\)](#)

Under [705 ILCS 405/5-615\(l\)](#) and [In Veronica C., 239 IL 2d 134, 940 N.E.2d 1 \(2010\)](#), a minor may request a continuance under supervision in a juvenile case before an adjudication of delinquency is made, provided that the minor stipulates to facts supporting the petition and there is no objection by the minor, a parent, a guardian, or the prosecutor. Here, the minor rejected the State's pretrial offer of a continuance under supervision, but requested such a continuance after she was adjudicated delinquent.

The trial court indicated that had the State's Attorney not objected, it would have granted a continuance under supervision. The trial court then found that the provision of the statute requiring the State's Attorney's consent to a continuance under supervision was unconstitutional. The State appealed.

1. The Illinois Supreme Court found that the minor lacked standing to challenge the constitutionality of the requirement that the State's Attorney consent to a continuance under supervision.

2. However, the court concluded that defense counsel was ineffective for failing to request a continuance under supervision when it could have been granted. In addition, the trial court committed plain error where it believed that a continuance under supervision was the appropriate disposition but due to its misapprehension of the statute, failed to broach the subject until a continuance was statutorily precluded.

Ordinarily, the trial court has no obligation to suggest the possibility of a continuance under supervision. Here, however, the trial court's statements demonstrated its belief that supervision was the proper disposition. Under these circumstances, the failure to suggest a continuance under supervision "at the proper time was a result of the court's misunderstanding of the plain language of the statute." This misapprehension rendered the proceedings fundamentally unfair because "absent the trial court's misunderstanding . . . , [the minor's] opportunity to obtain a continuance under supervision would not have been lost."

The court remanded the cause for a new first-phase hearing at which the minor is to be properly advised that if she proceeds to trial and is unsuccessful, a continuance of supervision will be subject to the State's Attorney's approval. The minor will then be in a position to make an informed and knowing decision whether to accept the pretrial offer of a continuance under supervision, if that offer is reinstated. If she elects to go to trial, the minor will be able to request a continuance under supervision before the adjudication is announced.

#### **[People v. Faria, 402 Ill.App.3d 475, 931 N.E.2d 742 \(1st Dist. 2010\)](#)**

1. Although the forfeiture rule may be relaxed where an unpreserved issue concerns actions taken by the trial court, forfeiture should be ignored only in the most compelling situations, such as where a judge makes inappropriate remarks to the jury or the case involves capital punishment. ([People v. McLaurin, 235 Ill.2d 478, 922 N.E.2d 344 \(2009\)](#)). Here, the forfeiture rule was not relaxed although the trial judge "took over" defense counsel's cross-examination and interrupted counsel repeatedly.

First, because defendant was convicted in a bench trial, there was no jury to be influenced. However, "[h]ad this been a jury trial, we may well have reached a different decision."

Furthermore, the trial judge did not act in counsel's absence or in any way prevent objections from being made.

2. The plain error rule applies to a forfeited issue which affects the substantial rights of a defendant, if the evidence is so closely balanced that the guilty verdict might have resulted from the error or the error is so serious that the defendant was denied a substantial right and a fair trial. To determine whether plain error occurred under the latter test, the court must

first determine whether a clear or obvious error occurred.

Here, no clear or obvious error occurred. Thus, the plain error rule did not apply.

**People v. Jackson**, 409 Ill.App.3d 631, 949 N.E.2d 215 (1st Dist. 2011)

The plain error doctrine allows a court to review a forfeited claim of error that affects a substantial right in two instances: where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. Under the second prong of a plain error analysis, prejudice is presumed, but the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

Where the judge abandons his role as a neutral and impartial arbiter of fact, defendant's claim is reviewed under the second prong of the plain error doctrine because the trial court's conduct pertains to defendant's right to a fair trial. When a judge displays signs of bias against a defendant, the system ceases to function as it properly should, resulting in plain error and requiring reversal.

The trial judge abandoned his role as a neutral and impartial arbiter of fact in a bench trial when he adopted a prosecutorial role in questioning defendant's expert witness and relied on matters of prior private knowledge in rejecting defendant's insanity defense. Although not preserved for review, these errors were noticed under the second prong of the plain error analysis, requiring reversal of defendant's conviction.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

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### **§56-2(b)(5)**

#### **Sentencing Errors**

### **§56-2(b)(5)(a)**

#### **Plain Error**

**People v. Kuntu**, 196 Ill.2d 105, 752 N.E.2d 380 (2001) The prosecutor erred at a death hearing by: (1) describing a statutory mitigating factor as an aggravating factor, and (2) arguing that a natural life sentence would give five "free" murders to a defendant convicted of killing seven people. The court applied the plain error rule, finding that the evidence at the penalty phase of the sentencing hearing was closely balanced because the State relied only on the facts and circumstances of the crime and the defense introduced substantial mitigation.

**People v. Kopczick**, 312 Ill.App.3d 843, 728 N.E.2d 107 (3d Dist. 2000) A trial judge's reliance on an improper aggravating factor impinges upon the fundamental right to liberty, and constitutes plain error.

**People v. Whitney**, 297 Ill.App.3d 965, 697 N.E.2d 815 (1st Dist. 1998) Plain error occurs where the trial court imposes a consecutive sentence that is not authorized by law or relies on a non-existent prior conviction in imposing sentence. See also, **People v. Dover**, 312 Ill.App.3d 790, 728 N.E.2d 90 (2d Dist. 2000) (as a matter of plain error, resentencing was required where the trial court erroneously interpreted the law to require consecutive sentences).

**People v. Alvarez**, 344 Ill.App.3d 179, 799 N.E.2d 694 (1st Dist. 2003) Apprendi violation constituted plain error. Because the evidence was less than overwhelming here, a properly instructed jury might have concluded that the offense was not brutal and heinous and that an extended term was therefore not authorized.

**People v. McCormick**, 332 Ill.App.3d 491, 774 N.E.2d 392 (4th Dist. 2002) The trial court committed plain error by ordering defendant, who had been convicted of making telephone calls "with the intent to abuse, threaten[,] or harass" the complainant, to pay \$270 in restitution for parking tickets which the complainant received because she was afraid to park in public garages after receiving the calls.

**People v. Owens**, 377 Ill.App.3d 302, 878 N.E.2d 1189 (1st Dist. 2007) The court reviewed as a matter of plain error sentencing judge's impermissible double enhancement. Because the issue concerned the sentence which defendant was eligible to receive, it affected his substantial rights.

**People v. Zapata**, 347 Ill.App.3d 956, 808 N.E.2d 1064 (1st Dist. 2004) As a matter of plain error, the trial court erred by relying on its "distaste for gang violence" in sentencing defendant for a non-gang related murder. Due to the fundamental importance of a fair trial and the practical difficulties of objecting to the actions of the trial judge, the forfeiture rule is relaxed where the conduct of the judge is at issue.

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**Cumulative Digest Case Summaries §56-2(b)(5)(a)**

**People v. Lewis**, 234 Ill.2d 32, 912 N.E.2d 1220 (2009)

1. [730 ILCS 5/5-9-1.1\(a\)](#) provides that a person convicted of certain drug offenses "shall" be assessed a fine that is "not less than the full street value" of the substance seized. (See **NARCOTICS**, §34-4). Although defendant failed to object in the trial court, the Supreme Court concluded that imposition of a street value fine without a sufficient evidentiary basis satisfies the "fundamental fairness" prong of the plain error rule. The court rejected the Appellate Court's finding that a \$100 fine is too insignificant to constitute plain error, finding that a *de minimus* exception to the plain error rule "would be difficult to implement because of the difficulty in determining when an error is significant," and would be inconsistent with "the fundamental fairness concerns of the plain error doctrine."

The court vacated the \$100 street value fine and remanded the cause for the trial court to impose a new fine based on evidence of the value of the substance seized from the defendant.

2. The court also held that the notice of appeal was sufficient to justify appellate review. (See **APPEAL**, §2-2(a)).

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

**People v. Easley**, 2012 IL App (1st) 110023 (No. 1-11-0023, 12/24/12)

Defendant was convicted of unlawful use of a weapon by a felon, a Class 3 felony that was enhanced to Class 2 because the offense was a second or subsequent violation. [725 ILCS 5/111-3\(a\)](#) provides that when the State seeks an enhanced sentence because of a prior conviction, the charge must give notice to the defendant by stating its intent to seek an enhanced sentence and the prior conviction that will be used to seek the enhancement. An

enhanced sentence is defined as a sentence which due to a prior conviction is increased from one level of offense to a higher level offense.

The court concluded that where defendant was charged with the Class 3 offense of unlawful use of a weapon by a felon, and the charge did not give notice that the State intended to seek a conviction for an enhanced Class 2 offense, the essence of the issue was whether the sentence imposed was proper. The court reached the issue as plain error, although the defense did not raise the question until asked by the Appellate Court during oral argument, because sentencing issues which affect substantial rights are excepted from the waiver doctrine. The court rejected the State's argument that defendant was raising a challenge to the sufficiency of the charging document, and was therefore required to show prejudice because the challenge had not been raised in the trial court.

The court also held that reversal was required although the nine-year sentence which the defendant received for the Class 2 felony was within the authorized sentencing range for a Class 3 conviction. Even where the sentence imposed on an erroneous conviction would have been authorized for the correct conviction, the sentence must be vacated because the trial court relied on an erroneous view of the authorized sentencing range.

The court vacated the enhanced Class 2 sentence and remanded the cause with directions to sentence the defendant to between two and 10 years in prison, the authorized sentencing range for the Class 3 felony of unlawful use of a weapon by a felon.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

**[People v. Lashley, 2016 IL App \(1st\) 133401 \(No. 1-13-3401, 6/30/16\)](#)**

The trial court's mistaken belief that consecutive sentences were required constituted second prong plain error because the right to be lawfully sentenced is a substantial right.

(Defendant was represented by Assistant Defender Mike Orenstein, Chicago.)

**[People v. Sanders, 2016 IL App \(3d\) 130511 \(No. 3-13-0511, 6/13/16\)](#)**

The court concluded that the erroneous consideration of a factor inherent in the offense constitutes second prong plain error. Although some precedent has equated second prong plain error with structural error, the Illinois Supreme Court recently held that the second prong is not limited to structural error. [People v. Clark, 2016 IL 118845](#).

The court concluded that consideration of a sentencing factor that is inherent in the offense affects the fundamental right to liberty because it impinges on the basic right not to be sentenced based on an improper factor. Therefore, where more than insignificant weight is given to an inherent factor, second prong plain error occurs.

(Defendant was represented by Assistant Defender Vicki Kouros, Ottawa.)

**[People v. Sumler, 2015 IL App \(1st\) 123381 \(No. 1-12-3381, 3/26/15\)](#)**

It was plain error under the second prong for the trial court to mistakenly believe that defendant was entitled to day-for-day good conduct credit when actually defendant was required to serve 85% of his sentence. Remanded for a new sentencing hearing.

(Defendant was represented by Assistant Defender Sean Collins-Stapleton, Chicago.)

**[People v. Wheeler, 399 Ill.App.3d 869, 927 N.E.2d 829 \(1st Dist. 2010\)](#)**

Noting a conflict in authority, the court concluded that a violation of Rule 431(b) does not constitute such a serious error as to automatically require reversal under the second prong of the plain error rule. The court found that the reasoning of [People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 \(2009\)](#), which dealt with the failure to comply with a version of Rule

431(b) which required such questioning only if requested by the defense, also applies to violations of the current version of Rule 431(b).

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

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### **§56-2(b)(5)(b)**

#### **No Plain Error**

**People v. Armstrong**, 183 Ill.2d 130, 700 N.E.2d 960 (1998) No plain error where the instructions at a death hearing omitted the mental state requirement of a statutory aggravating factor; the evidence of guilt was overwhelming, and the sentencing jury had been instructed on the missing element at the guilt phase of the trial.

**People v. Crespo**, 203 Ill.2d 335, 788 N.E.2d 1117 (2003) A 75-year extended term based on the "exceptionally brutal and heinous" extended-term factor did not constitute plain error.

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### **Cumulative Digest Case Summaries §56-2(b)(5)(b)**

#### **People v. Hanson**, 2014 IL App (4th) 130330 (No. 4-13-0330, 12/30/14)

Under [730 ILCS 5/5-4.5-50\(d\)](#) a defendant must file a written motion challenging “the correctness of a sentence or any aspect of the sentencing hearing” within 30 days of the imposition of sentence. The written post-sentencing motion allows the trial court to review defendant’s contentions of sentencing error and save the delay and expense of waiting until appeal to correct any errors. It also gives the Appellate Court the benefit of the trial court’s reasoned judgment on potential issues.

1. Defendant argued that although he was eligible for an extended-term sentence for domestic battery based upon prior felony convictions for retail theft and aggravated robbery (as listed in the pre-sentence investigation report), the trial court improperly imposed an extended-term sentence based upon a mistaken belief that defendant had a prior Class 4 felony conviction for domestic battery (as argued by the State).

The Appellate Court declined to address the merits of defendant’s claim. His claim was based entirely on the trial court misunderstanding his criminal history, but defendant made no effort to point this error out at trial and create a clear record of the trial court’s actual basis for imposing the sentence. By raising the issue for the first time on appeal, defendant was essentially asking the Appellate Court to “use the transcript of the sentencing hearing as a crystal ball” to understand the trial court’s thinking. The Appellate Court refused to engage in “mind-reading” and thus would not review the issue.

The court also held that the plain-error rule did not apply. The court rejected other Appellate Court decisions holding that sentencing errors involving a misapplication of law are reviewable as plain error since the right to be sentenced lawfully affects a defendant’s fundamental right to liberty. If all matters involving misapplication of law at sentencing were reviewable as plain error, it would render the forfeiture rule meaningless.

2. The court also declined to review as plain error, despite the State’s agreement, defendant’s claim that the trial court imposed a restitution order without an evidentiary basis



for the correct amount of restitution. It rejected the idea that all sentencing errors are reviewable simply because defendant asserts “a few ten-dollar phrases” such as “substantial rights,” “grave error,” and the “fundamental right to liberty.” Since all sentencing errors arguably involve the fundamental right to liberty, applying plain-error requires a more in-depth analysis, requiring a defendant to explain why the sentencing error in his particular case merits plain-error review.

Here, neither defendant nor the State attempted to explain why the trial court’s error was more substantial relative to other types of sentencing errors. The sentence and restitution order were affirmed.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

**[People v. Wheeler, 399 Ill.App.3d 869, 927 N.E.2d 829 \(1st Dist. 2010\)](#)**

Noting a conflict in authority, the court concluded that a violation of Rule 431(b) does not constitute such a serious error as to automatically require reversal under the second prong of the plain error rule. The court found that the reasoning of [People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 \(2009\)](#), which dealt with the failure to comply with a version of Rule 431(b) which required such questioning only if requested by the defense, also applies to violations of the current version of Rule 431(b).

(Defendant was represented by Assistant Defender Adrienne River, Chicago.)

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**§56-2(b)(6)**

**Other**

**§56-2(b)(6)(a)**

**Plain Error**

**[People v. Lofton, 194 Ill.2d 40, 740 N.E.2d 782 \(2000\)](#)** Because a substantial right is involved, the plain error rule applies where the issue involves defendant's right to personally attend a critical hearing.

**[People v. Walker, 232 Ill.2d 113, 902 N.E.2d 691 \(2009\)](#)** As a matter of plain error under the second prong, the court held that the trial court failed to exercise its discretion concerning defense counsel's request for a continuance.

**[People v. Smith, 106 Ill.2d 327, 478 N.E.2d 357 \(1985\)](#)** Despite the absence of an objection in the trial court, the Court considered the merits of whether defendants effectively waived jury trials. "Without determining that in every case the sufficiency of a jury waiver will warrant review, we shall consider the issue as it is presented in the two causes here, given its importance and the frequency with which it arises." See also, [People v. Collins, 9 Ill.App.3d 185, 292 N.E.2d 115 \(1st Dist. 1972\)](#).

**[People v. Bradley, 30 Ill.2d 597, 198 N.E.2d 809 \(1964\)](#)** Improper severance was plain error; the evidence was closely balanced.

**[People v. McKinstry, 30 Ill.2d 611, 198 N.E.2d 829 \(1964\)](#)** Where prejudicial error occurs in a competency hearing, the adjudication of competency and subsequent conviction will be set

aside despite the absence of an objection.

**In re R.A.B.**, 191 Ill.2d 358, 757 N.E.2d 887 (2001) Minor's adjudication as a violent juvenile offender reversed for lack of valid jury waiver; issue constituted plain error because it concerned fundamental procedure necessary to preserve the integrity of the judicial process.

**People v. Harvey** 211 Ill.2d 368, 813 N.E.2d 181 (2004) A "one-act, one-crime" violation constituted plain error.

**People v. Smith**, 183 Ill.2d 425, 701 N.E.2d 1097 (1998) Because entry of judgment on both felony murder and its predicate felony affected substantial rights, the plain error rule applies. See also, **People v. Boyd**, 307 Ill.App.3d 991, 719 N.E.2d 306 (3d Dist. 1999) (the erroneous entry of an improper conviction affects substantial rights and therefore constitutes plain error); **People v. Ousley**, 297 Ill.App.3d 758, 697 N.E.2d 926 (3d Dist. 1998) (plain error rule applies to legally inconsistent verdicts); **People v. Barraza**, 253 Ill.App.3d 850, 626 N.E.2d 275 (4th Dist. 1993) (entering judgment on both lesser and greater offenses constitutes plain error).

**People v. Schoreck**, 384 Ill.App.3d 904, 894 N.E.2d 428 (2d Dist. 2008) Defendant's fitness to stand trial is a fundamental right which is reviewed under the plain error doctrine - regardless whether a pretrial fitness hearing was held but the issue was left out of the post-trial motion or the defense failed to raise the issue after a bona fide doubt of fitness arose.

**People v. Lang**, 346 Ill.App.3d 677, 805 N.E.2d 1249 (2d Dist. 2004) The court considered as plain error the trial court's denial of defendant's motion for appointment of a special prosecutor because the ruling affected defendant's substantial right to a fair trial.

**People v. Mitchell**, 238 Ill.App.3d 1055, 605 N.E.2d 1055 (2d Dist. 1992) Legally inconsistent verdicts are plain error and may be considered on review even if not preserved.

**People v. Taylor**, 244 Ill.App.3d 460, 612 N.E.2d 543 (2d Dist. 1993) Trial court committed plain error by excluding defendant's siblings from voir dire.

**People v. Herring**, 327 Ill.App.3d 259, 762 N.E.2d 1186 (4th Dist. 2002) A claim that there was no effective waiver of counsel is reviewed as plain error. Here, the court found violation of Supreme Court Rule 401 where no verbatim transcripts of purported waiver were prepared.

**People v. Williams**, 331 Ill.App.3d 662, 771 N.E.2d 1095 (1st Dist. 2002) The plain error rule applied to issue concerning trial court's failure to determine the extent of defendant's hearing impairment due to the fundamental nature of the issue.

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#### **Cumulative Digest Case Summaries §56-2(b)(6)(a)**

**In re Samantha V.**, 234 Ill.2d 359, 917 N.E.2d 487 (2009)

1. The court reiterated that the "one-act, one-crime" rule applies in juvenile proceedings. (See **JUVENILE**, §§33-5(a), 33-9.)
2. In order to preserve a claim of error for review, a minor must object at trial.

However, minors are not required to file post-adjudication motions.

The plain error doctrine allows a reviewing court to consider unpreserved error where the evidence is closely balanced or the error so serious as to affect the fairness of the trial and the integrity of the judicial process. Under either test, the defendant has the burden of persuasion. Before considering whether the plain error exception applies, the court must first determine whether any error occurred.

Here, the minor carried her burden to show that plain error occurred based upon the second prong of the plain error rule – because a “one-act, one-crime” violation affects the integrity of the judicial process.

**People v. Booker, 2015 IL App (1st) 131872 (No. 1-13-1872, 5/12/15)**

As a matter of plain error under the second-prong of the plain error rule, the court found that a defendant who was charged with home invasion while armed with a firearm could not be convicted of home invasion while armed with a dangerous weapon other than a firearm. Second-prong plain error applies where an unpreserved error violates due process and implicates the integrity of the judicial process.

The court rejected the argument that in Illinois, second-prong plain error is equivalent to “structural error” under the federal constitution and is recognized only where there is a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of the grand jury, denial of the right to self-representation at trial, denial of a public trial, or defective reasonable doubt instructions. The court noted that Illinois case law does not restrict plain error to the six types of structural error listed above, and that the Illinois Supreme Court has found second-prong plain error concerning other issues.

**People v. Campbell, 2015 IL App (3d) 130614 (No. 3-13-0614, 8/6/15)**

The failure to properly admonish defendant about his right to a jury trial affected his fundamental right to a jury and thus was reviewable under the second prong of plain error.

(Defendant was represented by Assistant Defender Sarah Curry, Chicago.)

**People v. Clark, 2014 IL App (1st) 123494 (No. 1-12-3494, 11/20/14)**

The court concluded that convicting a defendant on charges which were not lesser-included offenses of charged crimes constitutes plain error under the second prong of the plain error rule, which applies to clear and obvious errors which are so serious as to affect the reliability of the trial and challenge the integrity of the judicial process. The court rejected the State’s argument that the second prong of the plain error rule applies only to a limited class of errors identified as “structural error” by the United States Supreme Court, including the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. The court concluded that the Illinois Supreme Court did not intend to so limit second prong plain error.

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

**People v. Hagler, 402 Ill.App.3d 149, 937 N.E.2d 204 (2d Dist. 2010)**

An error must be preserved by both an objection at trial and inclusion in a post-trial motion to avoid forfeiture. An exception exists under the second prong of the plain-error rule if the error is so serious that it affects the fairness of the trial and challenges the integrity of the judicial process.

The court held that defendant’s one-act, one-crime argument was properly reviewed as

plain error because violations of the one-act, one-crime rule implicate the integrity of the judicial process.

(Defendant was represented by Assistant Defender John Hildebrand, Elgin.)

**People v. Johnson, 2012 IL App (1st) 091730 (No. 1-09-1730, 3/23/12)**

1. A court's non-compliance with Supreme Court Rule 431(b), which requires that the court ask prospective jurors whether they understand and accept certain basic criminal justice principles, is noticeable as plain error under the closely-balanced prong of the plain-error rule.

The evidence in this case was closely balanced such that the trial court's error threatened to tip the scales of justice against the defendant. The jury's verdict hinged on whether the State's eyewitnesses or the defendant's alibi witnesses were more credible. Neither side offered any physical evidence of defendant's whereabouts on the date of the offense. The State's eyewitnesses could reasonably have had a motive to fabricate evidence against defendant as their branch of a gang was at war with a branch of the gang of which defendant was a member. One of the eyewitnesses initially failed to identify defendant as one of the offenders. The defense witnesses all had a positive connection to the defendant and might have had a motive to fabricate testimony in his favor. It was not until four years after the date of the offense that a defense investigator asked the witnesses about defendant's alibi, but all gave reasons for finding that particular date memorable. Thus the relative credibility of the State's witnesses over the reliability of the defense witnesses was by no means obvious or apparent.

2. The improper admission of evidence is harmless error if no reasonable probability exists that the verdict would have been different if the evidence at issue had been excluded.

Because the evidence was closely balanced, the court also concluded that the admission of the prior consistent statement of a prosecution eyewitness was not harmless error. That eyewitness was the only witness who identified defendant as the offender on the date of the offense. By improperly bolstering the credibility of the eyewitness, the State may well have influenced the verdict in its favor.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

**People v. Mueller, 2015 IL App (5th) 130013 (No. 5-13-0013, 7/17/15)**

The trial court violated Supreme Court Rule 431(b) by failing to properly voir dire the potential jurors about the four **Zehr** principles. The court asked if the potential jurors *understood* that defendant was presumed innocent, did not have to present any evidence, and that his failure to testify could not be used against him. But the court never asked the jurors if they *accepted* any of these principles. The court also asked the potential jurors if they would require the State to prove defendant guilty beyond a reasonable doubt, but did not ask if they understood this principle.

Although defendant failed to object to the court's voir dire, the Appellate Court addressed the issue as plain error since the evidence was closely balanced. Reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Chris Kopacz, Chicago.)

**People v. Richardson, 2013 IL App (1st) 111788 (No. 1-11-1788, 11/13/13)**

Under the plain-error doctrine, the court may reverse a judgment if either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless

of the closeness of the evidence.

In a prosecution for aggravated battery of a child, plain error occurred where the trial court failed to ascertain that the prospective jurors both understood and accepted the principles specified in Supreme Court Rule 431(b). The defendant did not contest that the child was injured during the period of time that she had responsibility for the child. The issue that the jury had to decide was whether the defendant acted with intent to injure the child or knowledge that her acts would injure the child.

An ER doctor testified that the injury, a spiral fracture of the tibia, resulted from child abuse. Defendant's statement only admitted to pulling the child out of his child seat "in an aggressive way," which caused the child's foot to twist as she pulled him. Defendant did not state that she intended to twist the foot or that she knew that the twisting could cause great bodily harm. The ER doctor admitted that only 3% of his practice involved children as young as the injured child and that a physician at Children's Memorial Hospital could not determine whether the injury resulted from child abuse. Defendant's failure to tell the child's mother about the injury could be explained by fear and hope that the injury would not prove to be severe, even if defendant had caused the injury accidentally. On this evidence, it was a very close question whether defendant knew, before she pulled the child out of his car seat, that by so doing she would cause him great bodily harm.

The error left open the possibility that a juror may have resolved this close question on an improper basis. Jurors may not have understood the counterintuitive principle that, even after prosecutors filed a charge, they must presume the defendant innocent, and they must not treat defendant's decision not to testify as evidence of guilt. The court reversed and remanded because the error in questioning the venire may have tipped the scales of justice against defendant in this closely-balanced case.

Mason, J., dissented.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

### **People v. Rippatoe**, 408 Ill.App.3d 1061, 945 N.E.2d 132 (3d Dist. 2011)

The trial court committed plain error by failing to conduct a **Boose** inquiry before conducting a post-trial proceeding while the defendant was shackled. The court concluded that the failure to conduct a **Boose** hearing constitutes fundamental error which threatens the fairness of the proceeding.

(Defendant was represented by Assistant Defender Charles Hoffman, Supreme Court Unit.)

### **People v. Salgado**, 2012 IL App (2d) 100945 (No. 2-10-0945, 3/15/12)

1. The Sixth Amendment right to confront witnesses is distinct from the due-process right to be present at trial, and includes the right to hear and to view witnesses as they testify. When a defendant appears by counsel, the right to confront witnesses includes the ability to be of aid in counsel's cross-examination. A violation of the right to confront affects defendant's substantial right to a fair trial and may be noticed as plain error regardless of the strength of the State's evidence.

2. The court distinguished the loss of the right to confront when counsel agrees to the admission of stipulated testimony, from the loss of the right to confront a live witness. Where counsel stipulates to testimony, the loss of the right to confront is of a very limited scope because the parties know in advance precisely what the trier of fact is going to hear and the manner in which it will be presented. The dynamics are profoundly different with a live witness. With live testimony, a defendant's ability to see and to interact with counsel is

critical, and the damage from that loss is unknowable. Thus, unlike the case of stipulated testimony, any waiver of the right to confront a live witness must be knowing and voluntary, after defendant is advised of his right to confront the witness.

3. The Appellate Court concluded that defendant was denied his right to confront a witness against him when at the State's request, the court allowed a minor child to testify in chambers outside the presence of the defendant. Defendant did not validly waive his right to confront as nothing in the record showed that defendant understood that he had the right to be present, and knowingly and voluntarily waived that right. The record showed only that counsel asked for a moment with his client, and then indicated his client would remain in the courtroom when the court asked defense counsel his position regarding the State's request.

This plain error results in reversal of the defendant's conviction and remand for a new trial.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

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### **§56-2(b)(6)(b)**

#### **No Plain Error**

**People v. Harvey** 211 Ill.2d 368, 813 N.E.2d 181 (2004) Mere-fact method of impeachment did not amount to plain error. The evidence was not closely balanced, and the mere-fact method is not an issue that must be reached to preserve the integrity and reputation of the judicial process.

**People v. Allen**, 222 Ill.2d 340, 856 N.E.2d 349 (2006) The trial judge's error in requiring defendant to wear an electronic stun belt at his trial without conducting a hearing to determine that use of the belt was manifestly necessary was not plain error.

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### **Cumulative Digest Case Summaries §56-2(b)(6)(b)**

#### **People v. Belknap**, 2014 IL 117094 (No. 117094, 12/18/14)

1. At the time of trial, Supreme Court Rule 431(b) required the trial court to ask each potential juror whether he or she understood and accepted several principles, including: (1) the presumption of innocence, (2) the reasonable doubt standard; (3) that the defendant is not required to offer evidence; and (4) that the defendant's failure to testify could not be held against him. The Supreme Court reiterated that the trial judge is required to ask not only whether the prospective juror accepts such principles but also whether he or she understands them. The court accepted the State's concession that the trial judge erred by asking prospective jurors only whether they accepted the Rule 431(b) principles and not also whether they understood them.

2. The trial court's failure to comply with Supreme Court Rule 431(b) can constitute plain error only under the first prong of the plain error test, for clear or obvious error where the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant. **People v. Thompson**, 238 Ill. 2d 598, 939 N.E.2d 403 (2010). When reviewing a forfeited claim under the first prong of the plain error doctrine, the reviewing



court must undertake a commonsense analysis of all of the evidence in context.

After examining the evidence, the Supreme Court rejected the Appellate Court's holding that the evidence was closely balanced. Although there were no eyewitnesses to the crime, other evidence pointed to the defendant as the perpetrator and excluded any reasonable possibility that someone else inflicted the injuries on the decedent. In addition, the testimony of two jailhouse informants concerning defendant's statements was consistent although the informants were not in the jail at the same time and there was no evidence that they had communicated with each other about defendant. The court concluded that viewing the evidence in a common sense manner under the totality of circumstances, the evidence was not closely balanced. Defendant's conviction for first degree murder was affirmed.

3. In a concurring opinion, Justice Burke found that **Thompson** was wrongly decided. Justice Burke would have held that Rule 431(b) errors should be considered under the fundamental fairness prong of the plain error rule and not under the closely balanced evidence prong. Thus, plain error occurs where the unasked question creates a likelihood of bias that would prevent the jury from returning a verdict according to the facts and the law.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

### **People v. Johnson, 238 Ill.2d 478, 939 N.E.2d 475 (2010)**

1. Ordinarily, appellate review is waived unless the defendant both objected to an error at trial and raised the issue in the post-trial motion. The plain error rule allows a reviewing court to consider a forfeited claim when the evidence was so closely balanced that the error threatened to tip the scales of justice against the defendant, or where the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. Under the second test, the strength of the evidence is immaterial.

2. The second prong of the plain error rule was not satisfied where defendant failed to object when the trial court responded to a jury question without notifying the parties. Although criminal defendants have a general right to be present at every stage of the trial, the right to be present is not itself a substantial right under the Illinois or federal constitutions. Instead, it is a lesser right intended to secure substantial rights such as the right to confrontation, the right to present a defense, or the right to an impartial jury. Because the defendant failed to show that any of these underlying rights had been violated, responding to the note in the absence of defendant or his counsel was not such a serious error as to affect the fairness of the trial or the integrity of the judicial process.

The court acknowledged that historically, it granted a new trial whenever *ex parte* communication occurred between the trial judge and the jury. In recent years, however, it has moved away from that rule and requires a new trial only if the defendant suffered prejudice. Because the court's response to continue deliberations was well within the court's discretion and was not coercive, no prejudice occurred.

3. The court rejected defendant's argument that the failure to object to the *ex parte* communication was protected by [People v. Sprinkle, 27 Ill.2d 398, 189 N.E.2d 295 \(1963\)](#). In [Sprinkle](#), the Supreme Court held that the failure to object may be excused where the trial court overstepped its authority in the presence of the jury or would have been unwilling to consider an objection.

The trial court did not overstep its authority by instructing the jury to continue deliberating. Furthermore, nothing in the record suggests that the trial court would have ignored an objection raised after the jury was dismissed, when defendant first became aware of the note. Under these circumstances, **Sprinkle** does not justify relaxing the forfeiture rule.

Defendant's conviction for criminal sexual abuse was affirmed.

(Defendant was represented by Assistant Defender Melissa Maye, Ottawa.)

**People v. Belknap, 2013 IL App (3d) 110833 (No. 3-11-0833, 11/19/13)**

The determination of whether the evidence is closely balanced for purposes of the plain error rule is a different determination than whether the evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. A finding that the evidence was sufficient to prove defendant guilty does not preclude a determination that the evidence was closely balanced. There is no *de minimus* exception to this prong of the plain error rule, and defendant is not required to show any additional prejudice to be entitled to relief. Unpreserved error is considered when the evidence is closely balanced, regardless of the seriousness of the error.

The evidence against defendant was closely balanced. No eyewitnesses saw defendant commit the offense. No physical evidence directly linked defendant to the offense. The strongest evidence that the State presented was the testimony of two jailhouse informants regarding defendant's alleged confession to them. While such testimony may ultimately be found credible, it must be treated with caution. The remaining circumstantial evidence could be viewed as either indicative of defendant's guilt or explained innocently away depending on the view of the evidence taken by the jury.

Under the closely-balanced prong of the plain error rule, the Appellate Court reversed and remanded for a new trial because the trial court failed to determine that the prospective jurors both understood and accepted the four Rule 431(b) principles.

Wright, J., dissented. More recent guidance from the Illinois Supreme Court in [People v. White, 2011 IL 109689](#), and [People v. Adams, 2012 IL 111168](#), compels a different conclusion regarding whether the evidence of guilt is closely balanced. In evaluating whether the evidence is closely balanced, a court should conduct a qualitative, rather than quantitative, commonsense assessment of the totality of the evidence presented.

It was undisputed the cause of death was multiple blunt force trauma occurring 12 to 24 hours of the child's arrival in the emergency room. Only three persons, the child's mother, the child's uncle, and defendant, were among the potential perpetrators. The defense theory excluded the mother and the uncle as the perpetrators and suggested the injuries may have been caused by the child playing on a trampoline. However, that theory was not supported by any evidence and was inconsistent with the number and location of the child's injuries. It is entirely possible that the jurors rejected the testimony of the jailhouse informants and circumstantially inferred that defendant could only be certain of the innocence of the mother and uncle due to his knowledge of his role in the child's death.

(Defendant was represented by Assistant Defender Andrew Boyd, Ottawa.)

**People v. McGhee, 2012 IL App (1st) 093404 (No. 1-09-3404, 1/24/12)**

Addressing the issue as a matter of first impression, the Appellate Court concluded that no structural error occurs where the jury is not polled despite a timely request. Defendant has a substantive right to a unanimous verdict and a conviction based on a non-unanimous verdict is an error requiring automatic reversal. Polling the jury on request, however, is merely a procedural device to help ensure unanimity, and is not the sole means of ensuring a unanimous verdict. The failure to do so does not affect the fairness of the defendant's trial and challenge the integrity of the judicial process.

Because the trial court's failure to poll the jury on request does not require reversal under the second prong of the plain-error rule, and the Appellate Court had found on direct appeal that the evidence was not closely-balanced, defendant could not carry his burden under

either prong of the plain-error rule. Therefore, appellate counsel could not be faulted for failing to raise this non-preserved error on direct appeal.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

### **[People v. Oliver, 2012 IL App \(1st\) 102531 \(No. 1-10-2531, 5/9/12\)](#)**

Where the defendant has made a timely objection and properly preserved an error for review, the reviewing court conducts a harmless-error analysis in which the State has the burden of proof. Where the defendant fails to make a timely objection and forfeits review, the reviewing court will examine the record only for plain error. In plain-error review, the burden of persuasion remains on defendant.

When a defendant who has not waived or forfeited his right to be present shows that the court conducted a critical stage of the proceedings in defendant's absence, the defendant has shown a violation of his constitutional rights. The burden is on the State to show that the error is harmless beyond a reasonable doubt. Where the defendant has not preserved the error for review, the burden is on the defendant to show that he was prejudiced by the violation of his right to be present.

Plain error did not occur due to defendant's absence from the conference on jury selection because his absence did not have the slightest effect on the impartiality of jury selection.

(Defendant was represented by Assistant Defender Robert Hirschhorn, Chicago.)

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### **§56-3**

#### **Harmless Error and Structural Error**

#### **§56-3(a)**

##### **Generally**

**[Arizona v. Fulminante, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 \(1991\)](#)** In most cases, constitutional "trial error" is subject to harmless error analysis because the effect of the error can be "quantitatively assessed." But, where the constitutional error involves "structural defects" that affect "the framework within which the trial proceeds," rather than merely "an error in the trial process itself," the result of the trial is unreliable and harmless error analysis applies.

**[Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 \(1967\)](#)** Constitutional error must be found to be harmless beyond a reasonable doubt, **[Delaware v. Van Arsdall, 106 S.Ct. 1431, 89 L.Ed.2d 674 \(1986\)](#)**, **[People v. Smith, 38 Ill.2d 13, 230 N.E.2d 188 \(1967\)](#)**, and the State bears the burden of proving that such an error is harmless beyond a reasonable doubt. "[T]he beneficiary of a constitutional error [must] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." See also, **[Fontaine v. California, 390 U.S. 593, 88 S.Ct. 1229, 20 L.Ed.2d 154 \(1968\)](#)** (State failed to meet its burden of proving beyond a reasonable doubt that comment on defendant's failure to testify did not contribute to conviction); **[Anderson v. Nelson, 390 U.S. 523, 88 S.Ct. 1133, 20 L.Ed.2d 81 \(1968\)](#)**; **[People v. Chavez, 338 Ill.App.3d 835, 789 N.E.2d 354 \(1st Dist. 2003\)](#)** (because the State failed to make a harmless error argument, it failed to satisfy its burden of showing that

the constitutional error did not contribute to the verdict).

**Brecht v. Abrahamson**, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) 1. On direct appeal, the Chapman standard applies to constitutional error that is subject to harmless error analysis.

2. But, the Chapman harmless error standard (harmless beyond a reasonable doubt) does not apply in federal habeas corpus proceedings. Rather, in federal habeas corpus actions, errors that are subject to harmless error analysis are to be judged under **Kotteakos v. United States**, 328 U.S. 750 (1946), which holds that constitutional error is harmless unless it had a "substantial and injurious effect on the jury's verdict." Here, although the State violated due process by commenting on defendant's pretrial silence, the error was harmless because it had no substantial effect on the verdict. See also, **Fry v. Pliler**, 551 U.S. 112, 127 S.Ct. 2321, 168 L.Ed.2d 16 (2007) (on federal habeas review, the federal court must apply the Brecht test without regard to whether the state court recognized the error and applied the Chapman standard).

**Washington v. Recuenco**, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) Apprendi error is subject to harmless error analysis. See also, **People v. Thurrow**, 203 Ill.2d 352, 786 N.E.2d 1019 (2003); **People v. Nitz**, 219 Ill.2d 400, 848 N.E.2d 982 (2006).

**Rivera v. Illinois**, \_\_\_ U.S. \_\_\_, 129 S.Ct. 1446, 173 L.Ed.2d 320 (2009) A state trial judge's erroneous denial of a peremptory challenge does not require automatic reversal as a matter of federal law where the selected jurors were qualified and unbiased.

**People v. Glasper**, 234 Ill.2d 173, 917 N.E.2d 401 (2009) The trial court's violation of Illinois Supreme Court Rule 431(b) is subject to harmless error analysis and was harmless in this case.

**People v. Patterson**, 217 Ill.2d 407, 841 N.E.2d 889 (2005) Violations of **Crawford v. Washington** are subject to the harmless error rule.

**People v. Sullivan**, 72 Ill.2d 36, 377 N.E.2d 17 (1978) Error will be held harmless when it could not reasonably have affected the result or contributed to the conviction. See also, **People v. Carlson**, 92 Ill.2d 440, 442 N.E.2d 504 (1982).

**People v. Stechly**, 225 Ill.2d 246, 870 N.E.2d 333 (2007) There are three different approaches to measure error under the harmless error test: 1) determine whether the improperly-admitted evidence is merely cumulative or duplicative of the properly-admitted evidence; 2) focus on the error to determine whether it might have contributed to the conviction; or 3) examine the other evidence in the case to see if the overwhelming evidence supports the conviction. Here, the Court applied all three tests to find that the constitutional error was not harmless beyond a reasonable doubt. See also, **People v. Averbart**, 311 Ill.App.3d 492, 724 N.E.2d 154 (1st Dist. 1999) (the denial of cross-examination to show bias or motive was not harmless under any of the three tests); **People v. Brown**, 363 Ill.App.3d 838, 842 N.E.2d 1141 (1st Dist. 2005) (applying all three tests and concluding that the erroneously-admitted evidence was not harmless); **People v. Richee**, 355 Ill.App.3d 43, 823 N.E.2d 142 (1st Dist. 2005) (recognizing all three tests, and concluding that the erroneous other-crimes evidence was not harmless because the evidence undoubtedly contributed to defendant's conviction where there was no

physical evidence linking defendant to the crime and the evidence of guilt was circumstantial); **People v. Purcell**, 364 Ill.App.3d 283, 846 N.E.2d 203 (2d Dist. 2006) (applying the guilt-based approach and affirming defendant's conviction); **People v. Thompson**, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004) (applying the second test and finding that the error was not harmless).

**People v. Nitz**, 219 Ill.2d 400, 848 N.E.2d 982 (2006) When applying the harmless error rule, the appropriate standard is whether a rational jury would have convicted defendant absent the error. Thus, even had harmless error analysis been warranted, the appellate court erred by basing its analysis on speculation whether the jury would have found the factor which authorized an enhanced sentence.

**People v. Woodrum**, 223 Ill.2d 286, 860 N.E.2d 259 (2006) There is a two-part test for determining whether application of an unlawful presumption is harmless error: 1) determine what evidence the trier of fact actually considered in reaching the verdict; and 2) weigh the probative force of the evidence actually considered by the trier of fact against the probative force of the presumption standing alone. Here, the use of an unconstitutional presumption was harmless error. See also, **People v. Pomykala**, 203 Ill.2d 198, 784 N.E.2d 784 (2003) (an instruction based on 720 ILCS 5/9-3(b), which created an unconstitutional presumption by providing that in reckless homicide cases "being under the influence of alcohol or any other drug or drugs at the time of the alleged violation shall be presumed to be evidence of a reckless act unless disproved by evidence to the contrary," was not harmless because, although there was evidence in the record by which the jury could have convicted defendant of reckless homicide without the presumption, it could not be concluded beyond a reasonable doubt that the erroneous instruction had no effect on the verdict).

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#### Cumulative Digest Case Summaries §56-3(a)

**People v. Glasper**, 234 Ill.2d 173, 917 N.E.2d 401 (2009)

The court concluded that the failure to comply with [Rule 431\(b\)](#) during *voir dire* was harmless, finding that the error was not structural and that the evidence of guilt was overwhelming. (See also **JURY**, §32-4(a)).

(Defendant was represented by Assistant Defender Elizabeth Botti, Chicago.)

**People v. Lerma**, 2016 IL 118496 (No. 118496, 1/22/16)

The erroneous exclusion of expert testimony concerning the reliability of the eyewitness identification was not harmless. The Illinois Supreme Court has recognized three approaches to determine whether an error is harmless beyond a reasonable doubt: (1) whether the error contributed to the defendant's conviction; (2) whether the other evidence overwhelmingly supported the conviction; and (3) whether the excluded evidence would have been duplicative or cumulative.

Under each of these approaches, the exclusion of the testimony was not harmless beyond a reasonable doubt. First, there is no question that the error contributed to the defendant's conviction, as the exclusion of the testimony prevented the jury from hearing relevant and probative expert testimony relating to the State's sole testifying eyewitness in a case lacking any physical evidence linking defendant to the crime. Second, it cannot be said that the other evidence in the case overwhelmingly supported the defendant's conviction, as



the only other evidence of guilt was a hearsay excited utterance from a non-testifying witness. Third, the excluded testimony was neither duplicative nor cumulative of other evidence, as the jury heard nothing the reliability of expert eyewitness testimony.

(Defendant was represented by Supervisor Linda Olthoff, Chicago.)

### **People v. Thompson, 238 Ill.2d 598, 939 N.E.2d 403 (2010)**

Supreme Court [Rule 431\(b\)](#) requires the trial court to ask each potential juror whether he or she understands and accepts the presumption of innocence, the reasonable doubt standard, that the defendant need not present any evidence, and that the defendant's failure to testify cannot be held against him. The court found that defendant forfeited the issue by failing to raise it in the trial court, and that the forfeiture was not excused.

1. A violation of [Rule 431\(b\)](#) does not constitute "structural" error which requires reversal in every case. An error is structural only if it necessarily makes the trial fundamentally unfair or unreliable as a means of determining guilt or innocence. Only a limited number of errors are considered structural; examples include a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction.

The court noted that in [People v. Glasper, 234 Ill.2d 173, 917 N.E.2d 401 \(2009\)](#), it held that the failure to comply with an earlier version of [Rule 431\(b\)](#) was not structural error. The court concluded that the same reasoning applies to the amended version of the rule.

Although structural error would occur if a defendant was forced to stand trial before a biased jury, [Rule 431\(b\)](#) is but one method of insuring a fair jury. Thus, the failure to comply with [Rule 431\(b\)](#) does not necessarily result in a biased jury and unfair trial. Because the error does not in and of itself render the trial unreliable, the error is not structural.

2. Similarly, the forfeiture could not be excused under the "fundamental error" prong of the plain error rule. To satisfy this test, a clear or obvious error must have been so serious as to affect the fairness of the trial and challenge the integrity of the judicial process.

Because compliance with [Rule 431\(b\)](#) is not indispensable to a fair trial, the mere failure to comply with [Rule 431\(b\)](#) does not necessarily affect the fairness of the trial or challenge the integrity of the process. Thus, the plain error rule does not apply.

3. The court rejected the argument that defendant was excused from objecting to the noncompliance with Rule 431(b) under the **Sprinkle** doctrine, which relaxes the forfeiture rule where the trial court oversteps its authority in the presence of the jury or would not have been willing to consider an objection. There was no reason to believe that the trial court would have ignored an objection or would have refused to follow [Rule 431\(b\)](#) had the issue been raised.

4. Finally, the court rejected the argument that a "bright line" rule requiring reversal is necessary to force trial courts to comply with [Rule 431\(b\)](#). The court stressed that most cases in which trial courts failed to follow [Rule 431\(b\)](#) arose immediately after the rule was amended, and there is no reason to believe that trial judges are reluctant to follow the rule.

Defendant's conviction and sentence were affirmed.

(Defendant was represented by Assistant Defender Elena Penick, Chicago.)

### **People v. Washington, 2012 IL 110283 (No. 110283, 1/20/12)**

An error in refusing a second-degree instruction does not result in automatic reversal. Automatic reversal is required only where an error is deemed "structural," i.e., a systemic error that serves to erode the integrity of the judicial process and undermine the fairness of the trial. Structural errors affect the framework within which a trial proceeds, rather than



simply an error in the trial process itself. They include the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial, and defective reasonable doubt instructions.

An instructional error such as the denial of a second-degree murder instruction is harmless only if it is demonstrated that the result of the trial could not have been different had the jury been properly instructed.

Refusing defendant's request for a second-degree murder instruction was not harmless error. The court rejected the argument that because the jury rejected defendant's claim of self-defense, it would not have believed that he had an unreasonable belief in the need for use of force in self-defense. The evidence in the case was conflicting and diametrically opposed as to what transpired before and after the shooting. By refusing the second-degree murder instruction, the trial court took the determination of whether defendant's belief in self-defense was reasonable or unreasonable from the jury. The court could not say that the result of the trial would not have been different had the jury received a second-degree murder instruction.

The court affirmed the judgment of the Appellate Court reversing and remanding for a new trial.

(Defendant was represented by Rachel Moran, *pro bono*.)

**[People v. Brown, 2013 IL App \(2d\) 111228 \(No. 2-11-1228, 5/6/13\)](#)**

Adopting the reasoning of [U.S. v. Harbin, 250 F.3d 532 \(7th Cir. 2001\)](#), the Appellate Court concluded that allowing the State to exercise a peremptory challenge to excuse a juror after witnesses have testified constitutes structural error which requires automatic reversal without conducting harmless error analysis.

**[People v. Diggins, 2016 IL App \(1st\) 142088 \(No. 1-14-2088, 5/31/16\)](#)**

Defendant was convicted of aggravated unlawful use of a weapon based on his failure to have a firearm owner's identification (FOID) card. To prove the lack of a FOID card, the State introduced a certified letter from the Illinois State Police stating that defendant's application for a FOID card had been denied. The document was signed and notarized.

The court held that the admission of the certified letter violated defendant's right of confrontation. Although defendant testified at trial that he did not have a FOID card, the court held that the error was not harmless. If the affidavit had been properly excluded, the State would not have been able to prove an essential element of the offense and defendant may have decided not to testify. The court reversed the conviction and remanded the case for a new trial.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)

**[People v. McGhee, 2012 IL App \(1st\) 093404 \(No. 1-09-3404, 1/24/12\)](#)**

Addressing the issue as a matter of first impression, the Appellate Court concluded that no structural error occurs where the jury is not polled despite a timely request. Defendant has a substantive right to a unanimous verdict and a conviction based on a non-unanimous verdict is an error requiring automatic reversal. Polling the jury on request, however, is merely a procedural device to help ensure unanimity, and is not the sole means of ensuring a unanimous verdict. The failure to do so does not affect the fairness of the defendant's trial and challenge the integrity of the judicial process.

Because the trial court's failure to poll the jury on request does not require reversal under the second prong of the plain-error rule, and the Appellate Court had found on direct appeal that the evidence was not closely-balanced, defendant could not carry his burden under

either prong of the plain-error rule. Therefore, appellate counsel could not be faulted for failing to raise this non-preserved error on direct appeal.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

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### **§56-3(b)**

#### **Examples of Errors Not Subject to Harmless Error Analysis**

**Neder v. U.S.**, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) Only a limited class of constitutional errors are immune to harmless error analysis; such errors involve fundamental defects in the "structure" of the trial which render it unreliable "as a vehicle for determination of guilt or innocence." Such fundamental errors include: 1) the complete denial of counsel (**Gideon v. Wainwright**, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); **Holloway v. Arkansas**, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978)); 2) bias on the part of the trial judge (**Tumey v. Ohio**, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed.2d 749 (1927); **People v. Cole**, 54 Ill.2d 401, 298 N.E.2d 705 (1973) (impartial jury); **People v. Oliver**, 50 Ill.App.3d 665, 365 N.E.2d 618 (1st Dist. 1977)); 3) racial discrimination in the selection of the grand jury (**Vasquez v. Hillery**, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)); 4) denial of the right to self-representation (**McKaskle v. Wiggins**, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984)); 5) denial of right to a public trial (**Waller v. Georgia**, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed. 2d 31 (1984)); and 6) a defective reasonable doubt instruction (**Sullivan v. Louisiana**, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)).

An instruction that omits an element of the offense is subject to the harmless error rule.

**U.S. v. Gonzalez-Lopez**, 548 U.S. 140, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) A violation of the Sixth Amendment right to counsel of choice constitutes "structural" error which is not subject to the harmless error rule. See also, **People v. Bingham**, 364 Ill.App.3d 642, 847 N.E.2d 903 (4th Dist. 2006).

**Perry v. Leeke**, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989) A showing of prejudice is not an essential component of a violation of **Geders v. United States**, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), which held that the trial court's order directing defendant not to consult with his attorney during an overnight recess violated defendant's right to counsel.

**People v. Woods**, 184 Ill.2d 130, 703 N.E.2d 35 (1998) The use of a coerced confession as substantive evidence of guilt can never be harmless error (citing **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987)). See also, **People v. Traylor**, 331 Ill.App.3d 464, 771 N.E.2d 629 (3d Dist. 2002) (same). But see, **Arizona v. Fulminante**, 499 U.S. 279, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991) (the admission of an involuntary confession is a "trial error" that is subject to the Chapman harmless error rule; however, reviewing courts must "exercise extreme caution" before determining that the State's use of an involuntary confession was harmless).

**People v. Mack**, 167 Ill.2d 525, 658 N.E.2d 437 (1995) Where the jury's verdict was void because it set out some (but not all) of the elements of death penalty eligibility, it would be inappropriate to apply the harmless error rule.

**People v. Stromblad**, 74 Ill.2d 35, 383 N.E.2d 969 (1978) The failure to accurately instruct the jury on an essential element of the State's case was such a fundamental error that the Court reversed defendant's conviction without evaluating the evidence.

**People v. Reedy**, 186 Ill.2d 1, 708 N.E.2d 1114 (1999) Harmless error analysis is improper where the issue involves whether a legislative enactment was constitutionally passed. "[W]hen the procedure by which the General Assembly enacts legislation contravenes a constitutional mandate, a harmless error standard is inappropriate."

**People v. King**, 248 Ill.App.3d 253, 618 N.E.2d 709 (1st Dist. 1993) The court held that **Sullivan v. Louisiana** should be limited to situations in which the trial court gives a jury instruction which affirmatively misdefines reasonable doubt. **King** applied harmless error analysis to a case in which the judge neglected to give a general reasonable doubt instruction (IPI Crim.2d. No. 2.03), but the jury received other instructions that embodied the reasonable doubt standard.

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### Cumulative Digest Case Summaries §56-3(b)

**People v. Wrice**, 2012 IL 111860 (No. 111860, 2/2/12)

Under **People v. Wilson**, 116 Ill.2d 29, 506 N.E.2d 571 (1987), use of a coerced confession as substantive evidence of guilt cannot be harmless error. Here, the court noted that **Wilson** was based on United States Supreme Court precedent, and that in **Arizona v. Fulminante**, 499 U.S. 279 (1991), a plurality of the court concluded that admission of a coerced confession was subject to the harmless error rule.

In view of the factual situation and divided opinion in **Fulminante**, the court declined to abandon **Wilson** entirely. Instead, the court modified the rule to hold that use of a **physically** coerced confession as substantive evidence of guilt cannot be harmless error. The court noted that it was not required to decide whether the **Wilson** rule could stand as a matter of State constitutional law, because defendant claimed only that his rights had been violated under the federal constitution.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

**People v. Brown**, 2013 IL App (2d) 111228 (No. 2-11-1228, 5/6/13)

Adopting the reasoning of **U.S. v. Harbin**, 250 F.3d 532 (7th Cir. 2001), the Appellate Court concluded that allowing the State to exercise a peremptory challenge to excuse a juror after witnesses have testified constitutes structural error which requires automatic reversal without conducting harmless error analysis.

**People v. Franklin**, 2012 IL App (3d) 100618 (No. 3-10-0618, 6/7/12)

An error is reversible under the plain error doctrine when (1) A clear or obvious error occurred and the evidence is so closely balanced that the error threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. The second-prong of the plain-error rule equates with structural errors. An error is structural if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt of innocence.

A defective reasonable-doubt instruction is structural error that may be noticed as plain

error under the second prong of the plain-error rule.

(Defendant was represented by Assistant Defender Bryon Reina, Chicago.)

**[People v. Salgado, 2012 IL App \(2d\) 100945 \(No. 2-10-0945, 3/15/12\)](#)**

1. The Sixth Amendment right to confront witnesses is distinct from the due-process right to be present at trial, and includes the right to hear and to view witnesses as they testify. When a defendant appears by counsel, the right to confront witnesses includes the ability to be of aid in counsel's cross-examination. A violation of the right to confront affects defendant's substantial right to a fair trial and may be noticed as plain error regardless of the strength of the State's evidence.

2. The court distinguished the loss of the right to confront when counsel agrees to the admission of stipulated testimony, from the loss of the right to confront a live witness. Where counsel stipulates to testimony, the loss of the right to confront is of a very limited scope because the parties know in advance precisely what the trier of fact is going to hear and the manner in which it will be presented. The dynamics are profoundly different with a live witness. With live testimony, a defendant's ability to see and to interact with counsel is critical, and the damage from that loss is unknowable. Thus, unlike the case of stipulated testimony, any waiver of the right to confront a live witness must be knowing and voluntary, after defendant is advised of his right to confront the witness.

3. The Appellate Court concluded that defendant was denied his right to confront a witness against him when at the State's request, the court allowed a minor child to testify in chambers outside the presence of the defendant. Defendant did not validly waive his right to confront as nothing in the record showed that defendant understood that he had the right to be present, and knowingly and voluntarily waived that right. The record showed only that counsel asked for a moment with his client, and then indicated his client would remain in the courtroom when the court asked defense counsel his position regarding the State's request.

This plain error results in reversal of the defendant's conviction and remand for a new trial.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

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**§56-3(c)**

**Specific Factors That Have Been Considered in Determining Whether An Error is Harmless**

**§56-3(c)(1)**

**Whether the Evidence Is Overwhelming or Closely Balanced**

**§56-3(c)(1)(a)**

**Harmless Error**

**[Milton v. Wainwright, 407 U.S. 513, 92 S.Ct. 2174, 33 L.Ed.2d 1 \(1972\)](#)** The use of defendant's post-indictment statements to policeman posing as a jail inmate was harmless error; there were three unchallenged confessions and strong corroborative evidence of guilt. See also, **[People v. Bridges, 198 Ill.App.3d 534, 555 N.E.2d 1191 \(3d Dist. 1990\)](#)** (erroneous

denial of defendant's motion to suppress confession was harmless); **People v. Kaprelian**, 6 Ill.App.3d 1066, 286 N.E.2d 613 (1st Dist. 1972) (use of confession obtained in violation of Miranda was harmless error).

**Schneble v. Florida**, 405 U.S. 428, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) The erroneous use of a co-defendant's statement implicating defendant was harmless in light of overwhelming evidence of guilt. See also, **Brown v. U.S.**, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); **People v. Moman**, 201 Ill.App.3d 293, 558 N.E.2d 1231 (1st Dist. 1990).

**People v. Johnson**, 114 Ill.2d 170, 499 N.E.2d 1355 (1986) Prosecutor's comments in closing argument were harmless error in light of the overwhelming evidence of guilt. See also, **People v. Caballero**, 126 Ill.2d 248, 533 N.E.2d 1089 (1989); **People v. Tiller**, 94 Ill.2d 303, 447 N.E.2d 174 (1982); **People v. Carlson**, 92 Ill.2d 440, 442 N.E.2d 504 (1982).

**People v. Carlson**, 92 Ill.2d 440, 442 N.E.2d 504 (1982) Introduction of evidence of another crime was harmless error where the properly-admitted evidence was so overwhelming that no fair-minded jury would reasonably have voted to acquit. See also, **People v. Pittman**, 93 Ill.2d 169, 442 N.E.2d 836 (1982); **People v. Foster**, 103 Ill.App.3d 372, 431 N.E.2d 430 (2d Dist. 1982); **People v. Adams**, 106 Ill.App.3d 467, 435 N.E.2d 1203 (1st Dist. 1982) (harmless error to cross-examine defendant concerning prior conviction; evidence of guilt was overwhelming).

**People v. Moore**, 95 Ill.2d 404, 447 N.E.2d 1327 (1983) Trial court's refusal to give instruction on voluntary manslaughter was harmless. Because the overwhelming weight of evidence established that defendant was guilty of felony murder, it made no difference whether the killing was done in the unreasonable belief of self-defense. See also, **People v. Jones**, 81 Ill.2d 1, 405 N.E.2d 343 (1979) (failure to instruct jury on correct mental state for attempt murder was harmless error where intent to kill was "blatantly evident").

**People v. Cooper**, 188 Ill.App.3d 971, 544 N.E.2d 1273 (5th Dist. 1989) Improper introduction of a witness's prior inconsistent statement as substantive evidence was harmless in light of defendant's confession.

**People v. Austin**, 123 Ill.App.3d 788, 463 N.E.2d 444 (2d Dist. 1984) Improper limitation on cross-examination was harmless error in view of overwhelming evidence.

**People v. Blackwell**, 325 Ill.App.3d 354, 757 N.E.2d 589 (1st Dist. 2001) Apprendi error concerning the "victim over 60" extended term eligibility factor was harmless where the parties did not dispute testimony that the victim was 71, and "the finding by the trial court did not involve a weighing of evidence or an examination of defendant's mental state."

**People v. Bryant**, 94 Ill.2d 514, 447 N.E.2d 301 (1983) Error in admitting inculpatory statement of State's hostile witness was harmless in view of the overwhelming evidence of guilt.

**Griffin v. Pierce, 622 F.3d 831 , 2010 WL 3655899 (7th Cir. 2010)**

A conviction is obtained in violation of the Fourteenth Amendment where: (1) the prosecution presents false testimony or fails to disclose that false testimony was used to convict; (2) the prosecution knows or should know that the testimony is false; and (3) there is a reasonable likelihood that the testimony could affect the jury's verdict.

There was no reasonable likelihood that the false testimony of a prosecution witness denying receiving any money from the prosecution could have affected the jury's judgment. Even discounting the testimony of the prosecution witness who testified falsely regarding the consideration for his testimony, defendant's conviction was secure. Defendant made a court-reported confession testified to by both the court reporter and an Assistant State's Attorney, who also testified to a consistent oral confession made to him by the defendant. Defendant's refusal to sign the court-reported statement was of little consequence. There was an audiotape of a conversation between the witness and the defendant in which the defendant confessed. The Assistant State's Attorney testified that he overheard that conversation. Although the tape recording was unintelligible at the time of the habeas proceeding, there was no evidence that it was unintelligible at the time of the state court proceedings.

(Defendant was represented by Staff Attorney Gregory Swygert, Capital Post-Conviction Unit.)

**In re Brandon P., 2014 IL 116653 (No. 116653, 5/22/2014)**

Whether a violation of the confrontation clause constitutes harmless error depends on whether it appears beyond a reasonable doubt that the error did not contribute to the verdict. In deciding if an error is harmless, a reviewing court may: (1) focus on the error to decide if it might have contributed to the conviction; (2) examine the other evidence to see if it overwhelmingly supports the conviction; or (3) determine if the improper evidence is merely cumulative or duplicates the properly admitted evidence.

The court held that the improper admission of statements made to a police officer by the three-year-old complainant, and which described the offense, was harmless beyond a reasonable doubt. The properly admitted evidence in this case overwhelmingly established respondent's guilt for aggravated criminal sexual abuse. Shortly after the offense occurred, the complainant spontaneously told her mother that respondent committed an act of sexual conduct by touching her "pee-pee" with his finger. The complainant's actions, including holding herself and complaining that it hurt when she went to the bathroom, corroborated the account of the offense she gave to her mother.

Additionally the complainant's seven-year-old brother testified that something happened to the complainant when the brother was in the bedroom with the complainant and the respondent, and that the complainant was lying on the floor not wearing pants. The respondent admitted to the police that he was in the bedroom with the complainant and her brother and sister, and that he showed the children pictures of naked women. There were no conflicts or inconsistencies in this evidence, especially concerning the offender's identity.

The State also introduced forensic DNA evidence that connected respondent to the offense. Respondent could not be excluded from seven loci of the DNA evidence found on the complainant's underwear. While this did not constitute a "match," such a correlation would be expected to occur randomly in the population only once in every 7,400 Caucasian individuals.

Because the properly admitted evidence overwhelmingly supported respondent's conviction, the improper admission of the complainant's statement was cumulative to the properly admitted evidence and did not contribute to the adjudication of guilt. Under these



circumstances, the improper evidence was harmless beyond a reasonable doubt.

(Respondent was represented by Assistant Defender Catherine Hart, Springfield.)

**[People v. Leach](#), 2012 IL 111534 (No. 111534, 11/29/12)**

Even if the admission of an autopsy report was error, it was harmless beyond a reasonable doubt. The defendant did not dispute the cause and manner of the death of the deceased, only his mental state. The State presented expert testimony independent of the autopsy report regarding death by strangulation in general. Defendant was tried in a bench trial and the court relied entirely on defendant's own statement and the expert's testimony regarding the time necessary to cause death by strangulation to find defendant guilty of first degree murder. The autopsy report had a negligible effect on the court's finding.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

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**§56-3(c)(1)(b)**

**Not Harmless Error**

**[People v. R.C.](#)**, 108 Ill.2d 349, 483 N.E.2d 1241 (1985) Introduction of a statement obtained in violation of **Miranda** was not harmless. The evidence against defendant was not overwhelming, and a "confession is the most powerful piece of evidence the State can offer, and its effect on a jury is incalculable."

**[People v. Emerson](#)**, 97 Ill.2d 487, 455 N.E.2d 41 (1983) Reversible error occurred from the combination of improper closing arguments (mentioning facts not in evidence and commenting about defense counsel) and the improper introduction of a prior consistent statement.

**[People v. Mullen](#)**, 141 Ill.2d 394, 566 N.E.2d 222 (1990) Prosecutor's unsubstantiated closing remarks (that a certain State witness was initially afraid to testify and that defendant had threatened the witness) were not harmless where the evidence against defendant was "closely balanced and littered with discrepancies" and the trial judge specifically admonished the attorneys not to refer to these matters. See also, **[People v. Wills](#)**, 151 Ill.App.3d 418, 502 N.E.2d 775 (2d Dist. 1986).

**[People v. Cline](#)**, 60 Ill.2d 561, 328 N.E.2d 534 (1975) Error in refusing to allow alibi witness to testify was not harmless; case against defendant rested solely on accomplice testimony, State argued that alibi was only partially corroborated, and the testimony of the missing witness was not cumulative.

**[People v. Enis](#)**, 139 Ill.2d 264, 564 N.E.2d 1155 (1990) Improper cross-examination of defendant, which brought out hearsay facts regarding alleged prior crime, was not harmless where the evidence of guilt was less than overwhelming.

**[People v. Richee](#)**, 355 Ill.App.3d 43, 823 N.E.2d 142 (1st Dist. 2005) Erroneous other-crimes evidence was not harmless error because the evidence "undoubtedly contributed to defendant's conviction" where there was no physical evidence linking defendant to the crime and the

evidence of guilt was circumstantial. "In purely circumstantial cases . . . , other crimes evidence, if improperly admitted, can never be harmless error."

**People v. Elliott**, 308 Ill.App.3d 735, 721 N.E.2d 715 (2d Dist. 1999) In a DUI trial, the court's erroneous admission of evidence regarding the civil penalties imposed on a motorist who refuses to take a breath test was not harmless error. The issue here is not whether defendant could have been convicted without evidence concerning the civil penalties for refusing a breath test, but whether the conviction resulted from the improper evidence. The court noted the trial judge's observation that the case "could have gone either way," and concluded that the verdict would not necessarily have been the same had the improper evidence been excluded.

**People v. VanScyoc**, 108 Ill.App.3d 339, 439 N.E.2d 95 (4th Dist. 1982) The introduction of hearsay testimony was reversible error; without the hearsay, the evidence was insufficient to prove guilt.

**People v. Kilzer**, 59 Ill.App.3d 669, 375 N.E.2d 1011 (5th Dist. 1978) It was improper for the prosecutor to argue the contents of defendant's written statement where that statement had not been introduced into evidence. The prosecutor's remarks may have created the impression that an incriminating statement had been suppressed, and the evidence in the case was conflicting.

**People v. Thompson**, 349 Ill.App.3d 587, 812 N.E.2d 516 (1st Dist. 2004) At a jury trial for aggravated domestic battery, aggravated battery and lawful restraint, the trial court erroneously admitted written statements which the complainant made in the course of obtaining an order of protection against defendant. The error was not harmless beyond a reasonable doubt; the evidence was not overwhelming, and there was a reasonable probability that the error contributed to the conviction.

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**Cumulative Digest Case Summaries §56-3(c)(1)(b)**

**People v. Washington**, 2012 IL 110283 (No. 110283, 1/20/12)

An error in refusing a second-degree instruction does not result in automatic reversal. Automatic reversal is required only where an error is deemed "structural," i.e., a systemic error that serves to erode the integrity of the judicial process and undermine the fairness of the trial. Structural errors affect the framework within which a trial proceeds, rather than simply an error in the trial process itself. They include the complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of the right of self-representation at trial, denial of a public trial, and defective reasonable doubt instructions.

An instructional error such as the denial of a second-degree murder instruction is harmless only if it is demonstrated that the result of the trial could not have been different had the jury been properly instructed.

Refusing defendant's request for a second-degree murder instruction was not harmless error. The court rejected the argument that because the jury rejected defendant's claim of self-defense, it would not have believed that he had an unreasonable belief in the need for use of force in self-defense. The evidence in the case was conflicting and diametrically opposed as to

what transpired before and after the shooting. By refusing the second-degree murder instruction, the trial court took the determination of whether defendant's belief in self-defense was reasonable or unreasonable from the jury. The court could not say that the result of the trial would not have been different had the jury received a second-degree murder instruction.

The court affirmed the judgment of the Appellate Court reversing and remanding for a new trial.

(Defendant was represented by Rachel Moran, *pro bono*.)

### **People v. Jackson, 2012 IL App (1st) 102035 (No. 1-10-2035, 7/10/12)**

A prosecutor's misstatement of the evidence may be reviewed as plain error where the evidence is close regardless of the seriousness of the error, or where the error is serious regardless of the closeness of the evidence. The evidence is closely balanced where it rests solely on the credibility of witnesses at trial.

Defendant was charged with aggravated unlawful use of a weapon when the police recovered a gun from his car. Defendant denied knowledge of the gun and testified that other people had been in the car that day. A passenger was also in the car when it was stopped. In closing argument, the prosecutor misstated the evidence when he remarked that defendant told the officers he found a gun in his car.

The prosecutor's misstatement of the evidence was plain error. The determinative issue at trial was defendant's knowledge that a gun was in his car when he was pulled over by the police. The jury's judgment rested solely on the credibility of witnesses at trial. Defendant had no opportunity to respond to the prosecutor's misstatement because it was made during rebuttal. Given the closeness of the evidence and the fact that the erroneous argument spoke directly to the issue of defendant's knowledge of the gun, the error substantially prejudiced defendant and was a material factor in his conviction. The court's instruction to the jury that closing argument is not evidence was insufficient to cure the error.

The Appellate Court reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

### **People v. Johnson, 2012 IL App (1st) 091730 (No. 1-09-1730, 3/23/12)**

1. A court's non-compliance with Supreme Court [Rule 431\(b\)](#), which requires that the court ask prospective jurors whether they understand and accept certain basic criminal justice principles, is noticeable as plain error under the closely-balanced prong of the plain-error rule.

The evidence in this case was closely balanced such that the trial court's error threatened to tip the scales of justice against the defendant. The jury's verdict hinged on whether the State's eyewitnesses or the defendant's alibi witnesses were more credible. Neither side offered any physical evidence of defendant's whereabouts on the date of the offense. The State's eyewitnesses could reasonably have had a motive to fabricate evidence against defendant as their branch of a gang was at war with a branch of the gang of which defendant was a member. One of the eyewitnesses initially failed to identify defendant as one of the offenders. The defense witnesses all had a positive connection to the defendant and might have had a motive to fabricate testimony in his favor. It was not until four years after the date of the offense that a defense investigator asked the witnesses about defendant's alibi, but all gave reasons for finding that particular date memorable. Thus the relative credibility of the State's witnesses over the reliability of the defense witnesses was by no means obvious or apparent.

2. The improper admission of evidence is harmless error if no reasonable probability

exists that the verdict would have been different if the evidence at issue had been excluded.

Because the evidence was closely balanced, the court also concluded that the admission of the prior consistent statement of a prosecution eyewitness was not harmless error. That eyewitness was the only witness who identified defendant as the offender on the date of the offense. By improperly bolstering the credibility of the eyewitness, the State may well have influenced the verdict in its favor.

(Defendant was represented by Assistant Defender Levi Harris, Chicago.)

**[People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 \(2d Dist. 2010\)](#)**

The erroneous admission of evidence that defendant possessed a gun 11 days after the date of the offense was not harmless. The court found that the evidence was not overwhelming because the jury found the defendant not guilty of aggravated battery charges that arose from the same act as the robbery charge for which defendant was convicted. Moreover, the error impinged on the integrity of the judicial system, requiring reversal regardless of the weight of the other evidence.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

**[People v. Shorty, 403 Ill.App.3d 625, 934 N.E.2d 647 \(3d Dist. 2010\)](#)**

The admission of hearsay evidence that an informant told the police that defendant was taking a trip to Chicago to pick up a large quantity of heroin and that defendant had in fact obtained the heroin was harmless. There was no reasonable probability that the jury would have acquitted defendant absent the hearsay evidence as the defendant was literally holding the bag of heroin when he was arrested.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

**[People v. Wilson, 2012 IL App \(1st\) 092910 \(No. 1-09-2910, 2/9/12\)](#)**

The trial court's erroneous denial of evidence to show bias and motive of the State's witnesses was not harmless beyond a reasonable doubt. The court rejected the State's argument that the jury was made aware of the evidence through cross-examination; defendant was only allowed to use isolated statements as impeachment, and was not allowed to explain that the statements were made as part of a separate investigation of the propriety of the witnesses' conduct. The court also noted that there was a lack of physical evidence in the case and that the jury elected to acquit defendant of a third charge.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

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**§56-3(c)(2)**

**Whether the Error Could Have Affected The Witness's Credibility in a Case in Which Credibility is Crucial to the Verdict**

**§56-3(c)(2)(a)**

**Harmless Error**

**[People v. Woollums, 143 Ill.App.3d 814, 493 N.E.2d 696 \(4th Dist. 1986\)](#)** Harmless error to

impeach defendant with conviction that was subsequently reversed; credibility was not a major issue, and defendant's guilt was established by eyewitness testimony.

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### **§56-3(c)(2)(b)**

#### **Not Harmless Error**

[People v. Zayas, 131 Ill.2d 284, 546 N.E.2d 513 \(1989\)](#) The use of hypnotically-enhanced testimony was not harmless error; evidence tended to corroborate the "State's most damaging witness," whose veracity "was otherwise somewhat suspect."

[People v. Cobb, 97 Ill.2d 465, 455 N.E.2d 31 \(1983\)](#) Errors in failing to give accomplice instruction, limitation of proffered witness's testimony, and denial of other proffered testimony constituted reversible error.

[People v. Schuning, 106 Ill.2d 41, 476 N.E.2d 423 \(1985\)](#) Improper impeachment of defendant's credibility with his prior convictions constituted reversible error. See also, [People v. Lindgren, 79 Ill.2d 129, 402 N.E.2d 238 \(1980\)](#) (extensive testimony regarding defendant's alleged commission of a crime was reversible error).

[People v. Gonzalez, 104 Ill.2d 332, 472 N.E.2d 417 \(1984\)](#) Improper limitation on defense cross-examination was reversible error where the questions, which concerned the gang activities and threats by the witness, were clearly relevant. See also, [People v. Stout, 110 Ill.App.3d 830, 443 N.E.2d 19 \(2d Dist. 1982\)](#) (trial court's refusal to allow defendant to cross-examine State witness as to his pending criminal charges was not harmless; the witness was the State's key witness, and his credibility was a crucial question); [People v. Paisley, 149 Ill.App.3d 556, 500 N.E.2d 96 \(2d Dist. 1986\)](#).

[People v. Lane, 106 Ill.App.3d 793, 436 N.E.2d 704 \(2d Dist. 1982\)](#) Use of confession obtained after defendant requested counsel was not harmless beyond a reasonable doubt; jury was required to resolve a credibility question as to defendant's and complainant's testimony.

[People v. Williams, 205 Ill.App.3d 1001, 564 N.E.2d 168 \(1st Dist. 1990\)](#) Improper cross-examination of defendant was not harmless; the determination of guilt depended on the jury's assessment of the witnesses' credibility.

[People v. Robertson, 198 Ill.App.3d 98, 555 N.E.2d 778 \(2d Dist. 1990\)](#) The prosecutor's improper cross-examination of defense witness (unsubstantiated assertions) was not harmless where the credibility of witnesses was a crucial issue.

[People v. Popely, 36 Ill.App.3d 828, 345 N.E.2d 125 \(1st Dist. 1976\)](#) Prosecutor's lengthy comments on defendant's failure to call a witness who may have been at the scene was reversible error where the central issue was the credibility of defendant and the complaining witness.

[People v. Wilson, 2012 IL App \(1st\) 092910 \(No. 1-09-2910, 2/9/12\)](#)

The trial court's erroneous denial of evidence to show bias and motive of the State's witnesses was not harmless beyond a reasonable doubt. The court rejected the State's argument that the jury was made aware of the evidence through cross-examination; defendant was only allowed to use isolated statements as impeachment, and was not allowed to explain that the statements were made as part of a separate investigation of the propriety of the witnesses' conduct. The court also noted that there was a lack of physical evidence in the case and that the jury elected to acquit defendant of a third charge.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

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**§56-3(c)(3)**

**Whether the Error Is of a Substantial or Insubstantial Nature**

**§56-3(c)(3)(a)**

**Harmless Error**

[People v. Kerans, 103 Ill.App.3d 522, 431 N.E.2d 726 \(3d Dist. 1982\)](#) Prosecutor's improper comment (that defendant talked with his attorney during trial) was harmless because it merely called attention to the obvious (i.e., it is common with all attorneys and clients to confer during the course of a trial). See also, [People v. Smylie, 103 Ill.App.3d 679, 431 N.E.2d 1130 \(1st Dist. 1982\)](#).

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**§56-3(c)(3)(b)**

**Not Harmless Error**

[Fahy v. Connecticut, 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171 \(1963\)](#) Use of illegally obtained evidence was not harmless where it significantly enhanced the State's case.

[People v. Ogunsola, 87 Ill.2d 216, 429 N.E.2d 861 \(1981\)](#) The failure to instruct the jury that "intent to defraud" was an essential element of deceptive practices was not harmless.

[People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432 \(1966\)](#) Prosecutor's misstatements of law, which destroyed the presumption of innocence and was tantamount to telling the jury that defendant had the burden of proving her innocence, was reversible error.

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**Cumulative Digest Case Summaries §56-3(c)(3)(b)**

[People v. Limon, 405 Ill.App.3d 770, 940 N.E.2d 737 \(2d Dist. 2010\)](#)

The erroneous admission of evidence that defendant possessed a gun 11 days after the date of the offense was not harmless. The court found that the evidence was not overwhelming



because the jury found the defendant not guilty of aggravated battery charges that arose from the same act as the robbery charge for which defendant was convicted. Moreover, the error impinged on the integrity of the judicial system, requiring reversal regardless of the weight of the other evidence.

(Defendant was represented by Assistant Defender Barbara Paschen, Elgin.)

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### **§56-3(c)(4)**

#### **Whether the Properly-Admitted Evidence Is Similar to or Cumulative of the Erroneously-Admitted or Erroneously-Excluded Evidence**

### **§56-3(c)(4)(a)**

#### **Harmless Error**

[People v. Chevalier, 131 Ill.2d 66, 544 N.E.2d 942 \(1989\)](#) Improper hearsay regarding threats made by defendant was harmless in view of properly-admitted testimony regarding such threats. See also, [People v. Cihlar, 106 Ill.App.3d 824, 436 N.E.2d 1041 \(1st Dist. 1982\)](#).

[People v. Felton, 108 Ill.App.3d 763, 439 N.E.2d 1107 \(2d Dist. 1982\)](#) Unconstitutional use of statement obtained after defendant had requested counsel was harmless; the statement merely substantiated the compulsion defense and did not contribute to the finding of guilt.

[People v. Stokes, 102 Ill.App.3d 909, 430 N.E.2d 370 \(1st Dist. 1981\)](#) State's introduction of illegally seized evidence was harmless error where victim's and defendant's testimony established existence of the items (and where defendant was tried by a judge, not a jury).

[People v. Rios, 145 Ill.App.3d 571, 495 N.E.2d 1103 \(1st Dist. 1986\)](#) State's failure to disclose a certain tape recording violated discovery rules but did not deprive defendant of a fair trial; the tape recording was not material and was in part cumulative, and there was substantial evidence of defendant's guilt. See also, [People v. Pearson, 102 Ill.App.3d 732, 430 N.E.2d 304 \(1st Dist. 1981\)](#) (State's failure to disclose prior conviction of its witness was harmless error where the testimony of that witness was cumulative).

[People v. Bartall, 98 Ill.2d 294, 456 N.E.2d 59 \(1983\)](#) Exclusion of testimony was harmless where such testimony was merely cumulative of other defense evidence.

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## **Cumulative Digest Case Summaries §56-3(c)(4)(a)**

### [In re Brandon P., 2014 IL 116653 \(No. 116653, 5/22/2014\)](#)

Whether a violation of the confrontation clause constitutes harmless error depends on whether it appears beyond a reasonable doubt that the error did not contribute to the verdict.

In deciding if an error is harmless, a reviewing court may: (1) focus on the error to decide if it might have contributed to the conviction; (2) examine the other evidence to see if it overwhelmingly supports the conviction; or (3) determine if the improper evidence is merely cumulative or duplicates the properly admitted evidence.

The court held that the improper admission of statements made to a police officer by the three-year-old complainant, and which described the offense, was harmless beyond a reasonable doubt. The properly admitted evidence in this case overwhelmingly established respondent's guilt for aggravated criminal sexual abuse. Shortly after the offense occurred, the complainant spontaneously told her mother that respondent committed an act of sexual conduct by touching her "pee-pee" with his finger. The complainant's actions, including holding herself and complaining that it hurt when she went to the bathroom, corroborated the account of the offense she gave to her mother.

Additionally the complainant's seven-year-old brother testified that something happened to the complainant when the brother was in the bedroom with the complainant and the respondent, and that the complainant was lying on the floor not wearing pants. The respondent admitted to the police that he was in the bedroom with the complainant and her brother and sister, and that he showed the children pictures of naked women. There were no conflicts or inconsistencies in this evidence, especially concerning the offender's identity.

The State also introduced forensic DNA evidence that connected respondent to the offense. Respondent could not be excluded from seven loci of the DNA evidence found on the complainant's underwear. While this did not constitute a "match," such a correlation would be expected to occur randomly in the population only once in every 7,400 Caucasian individuals.

Because the properly admitted evidence overwhelmingly supported respondent's conviction, the improper admission of the complainant's statement was cumulative to the properly admitted evidence and did not contribute to the adjudication of guilt. Under these circumstances, the improper evidence was harmless beyond a reasonable doubt.

(Respondent was represented by Assistant Defender Catherine Hart, Springfield.)

### [People v. Becker, 239 Ill.2d 215, 940 N.E.2d 1131 \(2010\)](#)

1. The failure to raise an issue in a petition for leave to appeal is not a jurisdictional bar to the court's ability to review a matter. When an issue is not specifically mentioned in a party's petition for leave to appeal, but is inextricably intertwined with other matters properly before the court, review is appropriate.

Although the issue of harmless error was not mentioned in the State's petition for leave to appeal, it did argue that the appellate court erred in finding that the evidence should have been excluded. The consequence of admitted evidence is inextricably intertwined with the propriety of its admission. Therefore, the Supreme Court could address whether admission of the evidence was harmless error.

2. When deciding whether an error is harmless, a reviewing court may: (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly-admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly-admitted evidence is merely cumulative or duplicates properly-admitted evidence.

Admission of an out-of-court statement made by a child-complainant five months after the date of the offense was harmless error because it was cumulative and duplicative of properly-admitted evidence. The jury heard evidence of a statement that the child made to her mother immediately after returning from defendant's house that was more detailed than

the statement asserted to be improperly admitted, as well as a videotaped interview by a detective that contained more detail than the subsequent statement. While the child expressed fear of her father that was not contained in the earlier statements, the only basis for her fear could be the conduct of defendant, which she did mention in her earlier statements.

**[People v. Leach, 2012 IL 111534 \(No. 111534, 11/29/12\)](#)**

Even if the admission of an autopsy report was error, it was harmless beyond a reasonable doubt. The defendant did not dispute the cause and manner of the death of the deceased, only his mental state. The State presented expert testimony independent of the autopsy report regarding death by strangulation in general. Defendant was tried in a bench trial and the court relied entirely on defendant's own statement and the expert's testimony regarding the time necessary to cause death by strangulation to find defendant guilty of first degree murder. The autopsy report had a negligible effect on the court's finding.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

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**§56-3(c)(4)(b)**

**Not Harmless Error**

**[People v. Cline, 60 Ill.2d 561, 328 N.E.2d 534 \(1975\)](#)** Error in refusing to allow alibi witness to testify was not harmless; case against defendant rested solely on accomplice testimony, State argued that alibi was only partially corroborated, and the testimony of the missing witness was not cumulative.

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**Cumulative Digest Case Summaries §56-3(c)(4)(b)**

**[People v. Adkins, 239 Ill.2d 1, 940 N.E.2d 11 \(2010\)](#)**

A police officer volunteered on examination by the State that he told the defendant he had not seen him in a long time, implying to the jury that defendant was a prior offender because he was known to the police. This error was harmless because the defense had already made the jury aware that defendant was a prior offender, consistent with its theory of defense that defendant was an experienced burglar who was careful to make sure that no one was at home before he entered the burglarized premises. The effect of the officer's testimony was minuscule and it was not a material factor in the conviction.

(Defendant was represented by Assistant Defender Allen Andrews, Supreme Court Unit.)

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**§56-3(c)(5)**

**Whether Corrective Action Occurred**

**§56-3(c)(5)(a)**

**Harmless Error**

[People v. Heflin, 71 Ill.2d 525, 376 N.E.2d 1367 \(1978\)](#) The prosecutor's clearly improper and misleading argument, which misstated the law of accountability, was harmless where the trial judge sustained a defense objection and admonished the jury to disregard the comment. See also, [People v. Cagle, 113 Ill.App.3d 1024, 448 N.E.2d 893 \(1st Dist. 1983\)](#).

[People v. Lucas, 132 Ill.2d 399, 548 N.E.2d 1003 \(1989\)](#) Prosecutor's improper comments in closing argument were harmless; the trial court sustained a defense objection and instructed the jury that closing arguments were not evidence and should be disregarded if not based on the evidence, and the evidence of guilt was substantial.

[People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 \(1986\)](#) Harmless error where prosecutor cross-examined witness about an alleged prior statement that was never introduced; the prosecutor admitted having made a mistake, and the jury was admonished that no prior statement had been made.

[People v. Layhew, 139 Ill.2d 476, 564 N.E.2d 1232 \(1990\)](#) Failing to give the jury a written instruction on the presumption of innocence and burden of proof ([IPi 2.03](#)) was harmless error. The trial judge explained these principles before trial, and the concepts were repeated during the trial. But see [People v. Williams, 120 Ill.App.3d 900, 458 N.E.2d 1312 \(1st Dist. 1983\)](#).

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### **§56-3(c)(5)(b)**

#### **Not Harmless Error**

[People v. Hope, 116 Ill.2d 265, 508 N.E.2d 202 \(1986\)](#) Testimony concerning the victim's family and prosecutorial comments about the family were reversible error. The testimony "was not brought to the jury's attention incidentally," the error was not invited by the defense, and "the prejudicial effect was amplified" because defense objections were overruled.

[People v. Sullivan, 72 Ill.2d 36, 377 N.E.2d 17 \(1978\)](#) The prosecutor committed reversible error by disclosing that defendant's alleged accomplices had pleaded guilty to the charges, and in relying on that fact in closing argument. Even in the absence of defense objections, the trial court should have taken "prompt corrective action in the form of a cautionary instruction or admonishment."

[People v. Brown, 113 Ill.App.3d 625, 447 N.E.2d 1011 \(1st Dist. 1983\)](#) The prosecutor's closing argument constituted reversible error though defense objections were sustained; the prosecutor called defense counsel a "slickster," "mouthpiece," and "liar," and made other remarks that were not supported by the evidence. The evidence of defendant's guilt was not so overwhelming as to outweigh the prejudicial impact of the prosecutor's remarks. See also, [People v. Wilson, 123 Ill.App.3d 798, 463 N.E.2d 890 \(1st Dist. 1984\)](#); [People v. Holloway, 119 Ill.App.3d 1014, 457 N.E.2d 466 \(1st Dist. 1983\)](#).

[People v. McCray, 60 Ill.App.3d 487, 377 N.E.2d 46 \(1st Dist. 1978\)](#) The prosecutor's rhetorical question (whether defendant had "any occupation other than robbing people") was "inexcusable" and constituted reversible error. That the judge sustained defense counsel's objection and instructed the jury to disregard the remark was not sufficient to erase the

prejudice, and the jury was required to evaluate the credibility of defendant and a State witness. See also, [People v. Rivera, 277 Ill.App.3d 811, 661 N.E.2d 429 \(1st Dist. 1996\)](#) (substantial prejudice does not vanish from the human mind simply because the judge instructs the jurors to disregard the incompetent evidence).

[People v. Williams, 120 Ill.App.3d 900, 458 N.E.2d 1312 \(1st Dist. 1983\)](#) The failure to instruct the jury on the presumption of innocence and burden of proof ([IPI 2.03](#)) was not harmless. The judge's oral statement at the beginning of trial is not the equivalent of a jury instruction and does not cure the failure to give an essential instruction. The minimal mention of the burden of proof during an issues instruction did not adequately apprise the jury of the substance of the omitted instruction. Compare, [People v. Ayala, 142 Ill.App.3d 93, 491 N.E.2d 154 \(1st Dist. 1986\)](#).

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### Cumulative Digest Case Summaries §56-3(c)(5)(b)

#### [People v. Jackson, 2012 IL App \(1st\) 102035 \(No. 1-10-2035, 7/10/12\)](#)

A prosecutor's misstatement of the evidence may be reviewed as plain error where the evidence is close regardless of the seriousness of the error, or where the error is serious regardless of the closeness of the evidence. The evidence is closely balanced where it rests solely on the credibility of witnesses at trial.

Defendant was charged with aggravated unlawful use of a weapon when the police recovered a gun from his car. Defendant denied knowledge of the gun and testified that other people had been in the car that day. A passenger was also in the car when it was stopped. In closing argument, the prosecutor misstated the evidence when he remarked that defendant told the officers he found a gun in his car.

The prosecutor's misstatement of the evidence was plain error. The determinative issue at trial was defendant's knowledge that a gun was in his car when he was pulled over by the police. The jury's judgment rested solely on the credibility of witnesses at trial. Defendant had no opportunity to respond to the prosecutor's misstatement because it was made during rebuttal. Given the closeness of the evidence and the fact that the erroneous argument spoke directly to the issue of defendant's knowledge of the gun, the error substantially prejudiced defendant and was a material factor in his conviction. The court's instruction to the jury that closing argument is not evidence was insufficient to cure the error.

The Appellate Court reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

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#### §56-3(c)(6)

#### Whether the Error was Repeated or Was Merely a Single, Isolated Incident

#### §56-3(c)(6)(a)

#### Harmless Error

[People v. Lucas, 132 Ill.2d 399, 548 N.E.2d 1003 \(1989\)](#) New trial not required where comment on victim's family was made only in passing and evidence of guilt was overwhelming.

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### **§56-3(c)(6)(b)**

#### **Not Harmless Error**

[People v. Weinstein, 35 Ill.2d 467, 220 N.E.2d 432 \(1966\)](#) Prosecutor's repeated statements that defendant had the burden to introduce evidence creating reasonable doubt were prejudicial; error was not harmless because other parts of closing argument and instructions accurately described the burden of proof.

[People v. Sullivan, 72 Ill.2d 36, 377 N.E.2d 17 \(1978\)](#) New trial was required where improper evidence was injected on three occasions.

[People v. Hope, 116 Ill.2d 265, 508 N.E.2d 202 \(1986\)](#) Prosecutor's reference to victim's family in opening statement, testimony of two witnesses, and closing argument required new trial.

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### **§56-3(c)(7)**

#### **Whether the Error, Such as Improper Evidence, Was Emphasized or Highlighted**

[People v. Anderson, 113 Ill.2d 1, 495 N.E.2d 485 \(1986\)](#) The State's introduction of evidence concerning defendant's responses to **Miranda** warnings, to disprove a claim of insanity, was reversible error where the prosecutor:

"explicitly told the jury that the evidence established the defendant's sanity under both prongs of the insanity defense, and this argument was consistent with the judge's admonitions. The State cannot now maintain that the jury ignored the advice and disregarded the evidence."

Further, the evidence of sanity was not overwhelming where there was sharp disagreement between the expert witnesses.

[People v. Lampkin, 98 Ill.2d 418, 457 N.E.2d 50 \(1983\)](#) In murder prosecution of police officers, the erroneous admission of threats defendant made to a police officer six years prior to the incident in question was prejudicial where the prosecution emphasized the evidence during its opening statement and closing argument and where the evidence against defendant was merely circumstantial. See also, [People v. Sullivan, 72 Ill.2d 36, 377 N.E.2d 17 \(1978\)](#) (prosecutor relied on inadmissible evidence during closing argument); [People v. Emerson, 97 Ill.2d 487, 455 N.E.2d 41 \(1983\)](#) (improper evidence emphasized in closing argument); [People v. Smith, 141 Ill.2d 40, 565 N.E.2d 900 \(1990\)](#) (prosecutor's comments about improperly introduced gang activity exacerbated the error); [People v. Mullen, 141 Ill.2d 394, 566 N.E.2d 222 \(1990\)](#) (prosecutor emphasized evidence which had been excluded).

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### **§56-3(c)(8)**

#### **Whether the Cumulative Errors Were Prejudicial**



[People v. Blue, 189 Ill.2d 99, 724 N.E.2d 920 \(2000\)](#) The cumulative effect of several errors violated due process and required reversal despite the existence of "overwhelming" evidence of guilt. Because the errors "created a pervasive pattern of unfair prejudice" and left the court unable to "confidently state that defendant's trial was fundamentally fair," reversal was necessary to "preserve the integrity of the judicial process."

[People v. Ray, 126 Ill.App.3d 656, 467 N.E.2d 1078 \(1st Dist. 1984\)](#) Although "eyewitness testimony strongly established defendant's guilt," the cumulative impact of the prosecutor's improper remarks was reversible error. The prosecutor "repeatedly attacked the professional integrity of defense counsel," misstated the law on the presumption of innocence, commented on defendant's failure to testify, suggested that evidence favorable to the State was excluded due to defense objections, and suggested that defendant "was manipulating his constitutional rights to escape conviction." See also, [People v. Lee, 128 Ill.App.3d 774, 471 N.E.2d 567 \(1st Dist. 1984\)](#); [People v. Starks, 116 Ill.App.3d 384, 451 N.E.2d 1298 \(1st Dist. 1983\)](#); [People v. McGee, 286 Ill.App.3d 786, 676 N.E.2d 1341 \(1st Dist. 1997\)](#); [People v. Clark, 335 Ill.App.3d 758, 781 N.E.2d 1126 \(3d Dist. 2002\)](#).

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**Cumulative Digest Case Summaries §56-3(c)(8)**

[People v. Boling, 2014 IL App \(4th\) 120634 \(No. 4-12-0634, 3/12/14\)](#)

Because the State's case in a prosecution for sex offenses against a child was based on the credibility of minor witnesses, the court found that the evidence was closely balanced. Thus, the plain error rule applied. Because defendant was denied a fair trial by the cumulative effect of several errors including the erroneous admission of hearsay evidence, allowing a prosecution witness to testify concerning the credibility of the complainant, and commenting in closing argument on the credibility of witnesses, the convictions were reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

[People v. Fultz, 2012 IL App \(2d\) 101101 \(No. 2-10-1101, 6/11/12\)](#)

The cumulative effect of two errors resulted in reversal of defendant's conviction and remand for a new trial: restricting cross-examination of a police officer-complainant regarding his bias or motive, and, over defendant's objection, instructing the jury that it could consider defendant's prior conviction in assessing his credibility.

The evidence was not overwhelming but presented a credibility contest between the defendant and the police officer. The erroneous rulings related to the heart of that issue. The defendant was not permitted to fully challenge the officer's credibility. The prosecutor relied on the instruction to remind the jury to consider defendant's prior conviction in assessing whether to believe defendant or the officer.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

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**§56-3(c)(9)**

**Other**

[People v. Weaver, 92 Ill.2d 545, 442 N.E.2d 255 \(1982\)](#) State's introduction of defendant's undisclosed statement, which showed a possible motive for the crime, was reversible error.

[People v. Woods, 139 Ill.2d 369, 565 N.E.2d 643 \(1990\)](#) The State's discovery violation (failure to produce the name and address of informant) was not harmless error; informant's testimony would have been relevant to the entrapment defense.

[People v. Alford, 111 Ill.App.3d 741, 444 N.E.2d 576 \(1st Dist. 1982\)](#) Improper use of evidence of other crimes was not harmless error; though error occurred at bench trial, the judge admitted the evidence over objection and indicated he was considering it.

[People v. Nuno, 206 Ill.App.3d 160, 563 N.E.2d 1165 \(1st Dist. 1990\)](#) Erroneous attempt murder instruction, which allowed the jury to convict without proof of an intent to kill, was not harmless where the jury's questions during deliberations showed confusion about the instruction.

[People v. Santiago, 108 Ill.App.3d 787, 439 N.E.2d 984 \(1st Dist. 1982\)](#) Reversible error occurred where trial court called deliberating jury into court, asked the numerical division, and upon learning that the majority favored conviction, ordered continued deliberations. The jury may well have believed that the judge concurred with the majority and that deliberations would continue until a guilty verdict was returned.

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**Cumulative Digest Case Summaries §56-3(c)(9)**

[People v. Lindsey, 2016 IL App \(1st\) 141067 \(No. 1-14-1067, 6/14/16\)](#)

Theft of property not exceeding \$500 is a Class A misdemeanor. [720 ILCS 5/16-1\(b\)\(1\)](#). Theft is elevated to a Class 4 felony if it is committed in a place of worship. [720 ILCS 5/16-1\(a\)\(1\)\(A\)](#). A place of worship is a “church, synagogue, mosque, temple, or other building...used primarily for religious worship and includes the grounds of a place of worship.” [720 ILCS 5/2-15b](#).

Any enhancement factor, other than a prior conviction, which increases the range of penalties must be submitted to the jury and proved beyond a reasonable doubt. [Apprendi v. New Jersey, 530 U.S. 466 \(2000\)](#). Although [Apprendi](#) errors are subject to harmless-error review, the State bears the burden of proving beyond a reasonable doubt that the outcome of trial would have been the same without the error.

A jury convicted defendant of Class 4 felony theft from a place of worship. But the jury was never instructed that the theft had to be committed in a place of worship. The court found that the failure to properly instruct the jury was reversible error since under the facts of this case the omitted instruction was not harmless beyond a reasonable doubt.

The theft took place in the parish office building located near the church. Defendant argued that the office building was entirely distinct from the church while the State argued that the office building was on the grounds of the church. The court noted that [Apprendi](#) errors have been found harmless only where the evidence was “uncontested and overwhelming,” but here the issue was hotly contested and involved complex facts applied to a statutory definition subject to conflicting interpretations. In these circumstances, the error could not be deemed harmless.

The court reduced defendant’s conviction to a Class A misdemeanor.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

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